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ABSTRACT

This second edition of this reference guide provides a survey of some of the major legal problems that confront policymakers and school administrators. It contains landmark cases and other cases that best illustrate major principles of education law, along with summaries, discussions, and analyses of the cases. Edited cases are integrated into analysis of legal issues to make the text more understandable for those not in the legal profession. Chapter titles reflect the scope and topics of the book: (1) "Understanding Education Law"; (2) "Compulsory Education"; (3) "Curriculum"; (4) "Student Free Speech Rights"; (5) "Student Discipline"; (6) "Equal Educational Opportunity: Race and Gender"; (7) "Students with Special Needs"; (8) "School Finance"; (9) "Federal Constitutional and Statutory Rights of School Employees"; (10) "Teacher Employment"; (11) "Collective Bargaining, Unions, and Teacher Contracts"; and (12) "Torts." It also contains parts of the U.S. Constitution that pertain to education law, a table of cases discussed in the book, and a subject index. (WFA)

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Education Law. Second Edition.

Michael Imber
Tyll Van Geel

2000

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EDUCATION LAW

SECOND EDITION

MICHAEL IMBER • TYLL VAN GEEL

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EDUCATION LAW

Second Edition

Michael Imber

and

Tyll van Geel

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We dedicate this book to our families:
Jane, Molly, and Jake Imber
Katy, Alix, and Tap van Geel

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PREFACE

The goal of this book is to provide education administrators and policy makers with the legal knowledge necessary to do their jobs. The text is organized to reflect the variety of legal problems that professional elementary and secondary school educators actually face. The greater the likelihood of litigation or legal controversy or error in a particular area of professional practice, the more extensive the discussion.

Every effort has been made to make the book comprehensible to readers with little or no background in law. The text is written in a style that educators should find familiar. When a technical legal term is used, its meaning is explained. Discussions of particularly complex topics begin with an overview, and subsequent sections provide additional detail. The last section of each chapter provides a summary of the most significant topics and principles discussed. Footnotes are placed on the same page as the related text so the reader can readily ascertain the source of authority for the principles under discussion. The first chapter is devoted to providing a foundation for understanding the remainder of the book, including a thorough explanation of the system of legal citations employed.

One cannot understand the subtlety and richness of the law without reading court decisions, but for legal neophytes cases without discussion and interpretation can be incomprehensible. Thus, the text explains the important concepts and principles of education law and presents court decisions to illustrate and illuminate them. The cases are edited to emphasize the issues most relevant to educational practice. Discussions of judicial rules and procedures and of technical questions not connected to the work of educational administrators and policy makers have been eliminated wherever possible.

Many of the references, citations, and footnotes in the original court decisions have also been deleted. Within the cases, ellipses indicate the removal of substantive text; where only references or citation are removed, no mark is employed. In some of the cases, we have provided summaries for long passages or added a word or phrase for clarity. Anything added to an opinion by the authors is enclosed in brackets.

One of the difficulties of producing a comprehensive treatment of U.S. education law is that legal principles and interpretations can vary significantly from state to state. No attempt has been made to exhaustively review the law of each state. Rather, the text focuses on generally applicable principles, noting areas where the specifics of state law vary. In these areas, readers may want to supplement the material presented with statutes and cases from their own state.

One final word of caution. Anyone who expects unambiguous answers to all legal questions is in for disappointment. Some legal issues are well settled and they are presented as such. However, by its very nature, the law is often complex and uncertain. New issues and new perspectives on old issues arise continually; questions that once seemed settled are reexamined as notions about government and law evolve. Even experts often cannot agree on the application of a legal principle to a particular situation. Therefore, in some instances we can only pose issues and present a range of less-than-definitive answers for contemplation.

We hope you learn from and enjoy the book.

—Michael Imber
—Tyll van Geel

PREFACE TO THE SECOND EDITION

Courts and legislatures at both the federal and state level are engaged in a never-ending process of development and revision of law. In particular, since the publication of the first edition of this textbook in 1993, a large number of changes have occurred in many areas of the law of education. The second edition has been extensively revised to account for these changes. Topics that have been added or significantly expanded or revised in this edition include (among many others): racial and sexual harassment of students and school employees, workers' compensation, affirmative action, defamation of character and employee letters of reference, equity and adequacy in school finance, issues relating to use of the Internet, and the new law of special education. The Table of Cases includes more than 500 new entries.

Although the overall goal and organization of the book remain the same, its structure has changed. The new edition contains about half as much case material (actual text of court decisions) and about twice as much commentary as the first edition. We have retained the most significant, "landmark," cases and cases that best illustrate the major principles of education law, but have substituted expanded explanation and analysis for many of the cases that focused on specific points of law. As in the first edition, the cases are integrated within a discussion of the relevant principles.

By employing this structure, we have attempted to combine the strengths of the traditional casebook and those of the legal treatise. We continue to believe that students of any area of law must read cases in order to become familiar with legal reasoning and as preparation for understanding future court decisions. Yet, our many years of experience as professors of education law have convinced us that a large number of cases without sufficient analysis can be overwhelming to students (especially nonlaw students) and that school administrators also need a systematic and useable overview of the principles, doctrines, and rules of educational law.

In reducing the number of cases printed in this edition we have also been mindful of the fact that court decisions at both the federal and state level are now readily available on the

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Internet. Thus, students have access to cases not in the book, including cases decided after publication, without leaving their homes.

Once again, we hope that your study of the law of education is successful and rewarding.

—Michael Imber
—Tyll van Geel

CHAPTER 1

UNDERSTANDING EDUCATION LAW

Educators perform their duties within a network of law—law that both empowers and constrains. The law creates local school districts and gives school boards the authority to raise taxes and borrow money, buy property, construct buildings, hire and fire teachers, purchase supplies, determine the curriculum, and discipline pupils. At the same time, the law limits the exercise of all these powers. The law protects the free speech rights of students and teachers; guarantees them procedural protections when they are disciplined or fired; and prohibits policies that wrongfully discriminate on the basis of race, national origin, gender, disability, or religion. The law provides an orderly way for students, parents, teachers, and taxpayers to seek a remedy when they believe the school has treated them unjustly.

This chapter introduces the forms of law that affect the operation of schools, the role of the courts in making and interpreting education law, and the judicial systems of the federal government and the states. In preparation for the cases and commentary that comprise the rest of the book, the chapter concludes by describing the elements of a court decision and explaining the standard system of legal citations.

1.1 FORMS OF LAW

The network of education law is woven of constitutional provisions, statutes, regulations, policies, and common law. These various forms of law are designed to complement one another, but at times they may conflict. To further complicate matters, rules of law originate at the federal and state levels and sometimes with local school boards. Thus, in a legal sense, school officials serve many masters.

THE FEDERAL CONSTITUTION

The Constitution of the United States is the fundamental law of the nation. The Constitution establishes the three branches of the federal government—executive, legislative, and judicial; describes the relationship among the three branches; forms the union of the states; dictates the relation between the federal government and the states; and provides for the protection of individual rights. The Constitution both legitimates and limits the actions of government and controls the relationship between the government and individual citizens but does not regulate interactions among private persons. Thus, the Constitution regulates the actions of government-run public schools and the relationship between the government and private schools. However, except under certain unusual circumstances, the Constitution does not limit the actions of private schools or control the relationships between private schools and their students or employees.

Although it mentions neither education nor schools, the Constitution has been interpreted as empowering Congress to raise money for education and to adopt certain types of legislation affecting schools. However, the Tenth Amendment limits the federal role in governing education: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Because the Constitution does not delegate to the United States or prohibit from the states the power to create and operate schools, the amendment allows states to perform these functions if they choose. Thus, the United States is one of the few countries without a centralized system of educational governance and policy making. The resulting system of state and local control of education complicates the study of education law because rules often vary from state to state and even within states.

The remainder of the federal Constitution is relevant to education, nevertheless, in that no state education law, school district policy, or public school practice may be inconsistent with any article or amendment to the Constitution. Many of the important legal conflicts in education involve statutes, policies, or practices alleged to violate constitutional provisions. Most often cited in those allegations are those constitutional provisions that guarantee certain rights and freedoms of citizenship by limiting the power of the government to control individual behavior. These include the First Amendment guarantees of freedom of speech and freedom of religion, the Fourth Amendment protection against unreasonable search and seizure, and the Fourteenth Amendment requirements that states not violate their citizens' rights to "due process" and "equal protection of the laws."

STATE CONSTITUTIONS

In keeping with the Tenth Amendment, the basic power to control education devolves upon the states. However, the U.S. Constitution does not require the states to exercise this power, and for several decades following the adoption of the Constitution the states did not use their inherent authority. However, as the nineteenth century progressed, the people of each state adopted a state constitution requiring their legislatures to establish a system of free public schooling for all children.

Typically, state constitutions contain vague language stating that there shall be schools and other educational activities and describing in general terms the way schools shall be governed and funded or the purposes for which they shall exist. For example, Article VIII, §1 of the Indiana Constitution states:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law, for a general and uniform system of Common School, wherein tuition shall be without charge, and equally open to all.

Thus, in Indiana, as in all states, the state legislature is charged with establishing and maintaining a system of free public schools. Many state constitutions also create state boards of education or state superintendencies and a few give these agencies powers independent of the legislature.

Most state constitutions contain provisions mirroring the federal Constitution, such as those prohibiting the establishment of religion and guaranteeing the equal protection of the laws. In fact, these state constitutional provisions may be more protective of individual rights than the U.S. Constitution. State constitutions may extend individual rights beyond those protected by the U.S. Constitution but they may not contradict the U.S. Constitution or permit government practices that it prohibits.

STATE AND FEDERAL STATUTES

The U.S. Congress and state legislatures execute their powers and duties through the enactment of statutes. Federal statutes must be consistent with the U.S. Constitution, and state statutes may not contradict either their own state's constitution or any federal law. A majority of the statutes controlling the operation of the public schools are enacted by state legislatures, but federal statutory law providing aid to schools and prohibiting various forms of discrimination are also significant.

Although the specifics vary greatly, most state legislatures have enacted statutes that:

- Dictate who may and who must attend school,
- Create local public school districts and boards and the means for their alteration and dissolution,
- Designate the qualifications for public school teachers and educational administrators,
- Prescribe the curriculum that the public schools must offer,
- Establish minimum requirements for high school graduation,
- Create a system for raising and distributing funds for education,

- Establish certain limited powers for schools to discipline students and employees,
- Fix the selection process, duties, powers, and limitations of local boards of education,
- Regulate certain aspects of the program of private schools, and
- Delegate authority to regulate and oversee certain aspects of education to state agencies and officers.

In every state, the laws governing education are organized by topic and published either as an education code or as a section of the general laws of the state.

Despite the Tenth Amendment, Congress can exercise great influence over schools by virtue of its ability to control the allocation of federal funds and by exercising its power to regulate interstate commerce. Federal statutes are particularly influential because, unlike state laws, they apply throughout the United States. However, unlike state legislatures, Congress historically has been reluctant to pass laws that regulate schools. In recent decades, this reluctance has abated somewhat as Congress has attached many conditions to the use of federal funds and enacted general laws that apply to schools, including, for example, laws prohibiting discrimination in employment and protecting the disabled.

REGULATIONS

Regulations differ from both constitutions and statutes. Most regulations are created by public departments, agencies, or bureaus that in turn are created by statutes. Regulations are designed to implement the goals and fill in the details of legislation. A regulation must meet three requirements: it must have been adopted according to a procedure prescribed in a statute, its substance must be consistent with the statute the regulation is intended to implement, and the statute itself must be constitutional.

Many of the specifics of education law are found in regulations issued by state departments of education, the U.S. Department of Education or its predecessors, and other state and federal agencies. For example, most of the rules governing the treatment of disabled students under the Individuals with Disabilities Education Act (see chap. 7) are contained in regulations created by the Department of Education. States also have extensive sets of regulations that provide further specifics concerning the required treatment of disabled pupils. Educators are as legally bound by these regulations as by the statute itself.

COMMON LAW

Constitutions are adopted by the people, statutes by legislatures, regulations by agencies, and the common law is created by courts. Hence, in common law cases, courts invent the relevant legal rules and apply them to the case at hand. By contrast, in constitutional and statutory cases, the court is only interpreting and applying a law created by another authority.

As it originally came to the United States from Great Britain the common law had two main branches: civil and criminal. Today in the United States the criminal branch has for the most part been superseded by statutes. For educators, the civil branch of the common law is the more important. This branch is divided into contracts and torts. Contract law establishes the conditions under which an exchange of promises creates binding obligations (see chap. 11). Tort law deals with a variety of matters including negligent behavior that results in an injury, intentional injuries, libel and slander, and injuries resulting from defects in buildings or land (see chap. 12). Each state has its own system of common law with some mostly minor variations among the states.

SCHOOL BOARD POLICIES

Subject to the scope of authority delegated to them by the state legislature, school boards may issue their own rules and regulations. All their enactments must conform to the limitations of relevant constitutional provisions, statutes, regulations, and common law. When a school board acts in accordance with these requirements its own rules and regulations are binding on itself. For example, if a board adopts a set of procedures to be used before a student is suspended from school, it and the district's employees may be legally required to adhere to them.

1.2 THE COURTS AND EDUCATION LAW

Courts perform three overlapping functions of importance to school officials whether or not they are personally involved in litigation. First, courts resolve conflicts by applying constitutional provisions, legislation, and regulations to specific situations. Second, courts rule on the constitutional validity of statutes, policies, and actions. For example, courts determine whether a statute is consistent with the Constitution or the dismissal of a student violates a constitutional right. Third, courts provide the official interpretation of the federal and state constitutions, statutes, regulations, and common law.

In performing these functions, courts must frequently deal with broad, ambiguous, and even vaguely worded rules of law. Often the meaning of a law is at the heart of a legal dispute. It is one thing to know, for example, that the Fourteenth Amendment to the U.S. Constitution requires "equal protection of the laws" for all persons and quite another to determine whether an affirmative action program that gives preference to some people because of their race or gender is consistent with this requirement.

Interpreting rules of law raises difficult and unsettled issues. Some argue that constitutional interpretation should be based solely on the intent of the framers and ratifiers, whereas others believe the Constitution must evolve in response to new conditions and problems. Similarly contentious issues arise concerning the interpretation of statutes and common law precedent.

Regardless of the theory of interpretation employed, the decisions rendered by courts form a body of law known as case law. Some case law is constitutional law, some is statutory law, and some is common law. The study of education law or any subject area of law is primarily a study of cases because case law provides the authoritative interpretation of constitutional provisions, statutes, and common law. We study cases to find out who prevailed in a particular legal dispute and to learn why. By studying the rulings of courts, we hope to learn to conduct ourselves lawfully in related situations.

Decisions in prior cases similar to the one under consideration are referred to as precedents. If a precedent comes from a court with jurisdiction in the area of a current dispute, it is called a mandatory precedent. If it comes from a different area of jurisdiction, it is called a persuasive precedent. Mandatory precedents make law and bind the actions of government in a particular area of jurisdiction, whereas persuasive precedents merely show how courts in other jurisdictions view a particular question.

Even when a mandatory precedent exists, it still may not govern the outcome of a current dispute. Because no two cases are ever factually identical, the precedent may only provide partial guidance or a critical difference may make the precedent distinguishable and thus inapplicable to a current case. Whether an otherwise binding precedent is distinguishable is frequently a matter of dispute in a lawsuit. A mandatory precedent from a higher court must be followed but courts may decline to follow their own previous rulings. Courts are not bound to follow persuasive precedents, but they may choose to unless there is a contradictory mandatory precedent.

1.3 THE JUDICIAL SYSTEM

There are both federal and state courts. Both systems are organized into three levels: trial courts, intermediate courts of appeal, and one (in a few states, two) highest court. Federal and state courts vary in the kinds of cases they may decide but, in both systems, courts at all levels are limited to dealing with cases that someone brings before them. A court cannot, for example, declare that a newly enacted statute is unconstitutional until a case comes before the court that depends on the constitutionality of the statute. In most instances, cases can only be initiated by someone with a direct stake in the outcome of the dispute. Such an individual is said to have standing.

FEDERAL COURTS

The federal court system deals almost exclusively with cases involving federal constitutional or statutory issues. Only in certain limited and exceptional circumstances will the federal courts deal with conflicts regarding the interpretation of state constitutions, state statutes, or common law. Nevertheless, the decisions of federal courts have had a tremendous impact on local schools.

There are ninety-five federal trial courts called district courts. Each state has at least one federal district court and heavily populated states may have several, each with jurisdiction over a different region of the state. These courts hear evidence in order to build the factual record of cases brought before them. Their primary function, once the facts are determined, is to apply the law as found in the Constitution, federal statutes, and relevant higher court precedent. Trial judges rarely get involved in reinterpreting the law.

The intermediate appellate courts in the federal system are the circuit courts of appeal. There are thirteen federal circuit courts—eleven with jurisdiction over a group of states, one for the District of Columbia, and one consisting of three specialized federal courts. Table 1.1 indicates the jurisdiction of each circuit.

The function and procedures of both the intermediate and highest appellate courts differ greatly from trial courts. These multimember courts conduct no trials and hear no new evidence. Their sole function is to review the records of lower courts to determine if errors of law have been committed. Errors of law come in many forms, including incorrect instructions to a jury, wrongful applications of rules of evidence, procedural mistakes, and misinterpretations of the Constitution, relevant statutes, or other rules of law.

After considering both written and oral arguments from both sides of the case, the panel of judges votes, reaches a decision, and begins the process of opinion writing. This may entail some bargaining among the judges regarding the rationale for the decision and the legal rules and principles to be announced. If an appellate court decides that an error of law has been made, it has two basic options: to declare a new final judgment or to remand the case for retrial by the lower court in accordance with the appellate court's new ruling.

TABLE 1.1 Jurisdiction of Federal Circuit Courts of Appeal

Circuit	*Jurisdiction*
1st	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
2nd	Connecticut, New York, Vermont
3rd	Delaware, New Jersey, Pennsylvania, Virgin Islands
4th	Maryland, North Carolina, South Carolina, Virginia, West Virginia
5th	Louisiana, Mississippi, Texas
6th	Kentucky, Ohio, Michigan, Tennessee
7th	Illinois, Indiana, Wisconsin
8th	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
9th	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington
10th	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming
11th	Alabama, Florida, Georgia
D.C.	Washington, D.C.
Federal	Washington, D.C. (specialized courts)

The highest federal court, the **Supreme Court**, hears appeals from the federal circuit courts and from any of the state highest courts in cases involving issues of federal law. (In rare instances, not usually relevant to education, the Supreme Court may also conduct trials.) The Court is not obligated to hear every case appealed to it and decides with full opinion only 125 to 150 of the 5,000 cases brought to it each year. The Court is so selective regarding the cases it chooses to hear because its primary purpose is not simply to correct the mistakes of the lower courts. As the only court whose rulings are binding throughout the country, the Supreme Court serves as the final arbiter of the meaning of federal statutes and the U.S. Constitution. As such, the Court endeavors to hear cases that will resolve inconsistent rulings among the federal circuit courts that raise an especially important or novel point of law and that have potentially widespread consequences.

Supreme Court justices and all other federal judges are appointed by the president with Senate approval and serve for life unless removed for committing a crime. Because the Supreme Court has nine members, it takes the agreement of five to form a **majority opinion** of the Court. Precedent is created only if at least five justices agree on the outcome of a case and the rationale for the decision. Justices who disagree with the decision may issue **dissenting opinions** but only majority opinions have the force of law. Similarly, justices agreeing with the outcome but disagreeing with the rationale may issue separate, nonbinding, **concurring opinions**.

Even when there is no majority agreement on the rationale for a decision the outcome of the case is still decided by majority vote. There may be a **plurality opinion** supported by a majority of the justices on the winning side and one or more concurring and dissenting opinions. If the Court is split badly enough there may not even be a plurality opinion, only a brief unsigned *per curiam* opinion stating the outcome of the case and a group of concurring and dissenting opinions. In any case, none of the various opinions issued when there is no majority opinion creates precedent. When the Court is deadlocked on even the outcome of a case, with one judge not participating, the judgment of the circuit court is affirmed and no precedent is created.

STATE COURTS

State courts hear cases involving state constitutional law, state statutes, and common law and may also hear cases involving federal issues. Cases raising both state and federal questions are heard in state court. The majority of education cases are decided in state courts because they raise no federal legal questions. For example, cases of alleged negligence by school officials are usually heard in state courts.

The structure of state judiciaries mirrors the federal system: trial courts, intermediate appellate courts, and usually a single highest court. Although state courts at all levels are known by a variety of names, in the majority of states the highest court is the supreme court. State trial courts usually cover a relatively small geographical area, whereas intermediate courts hear appeals from more than one trial court jurisdiction. As in the federal system, the opinions of intermediate courts are binding only within their jurisdiction so it is possible for different intermediate courts within the same state to reach conflicting legal conclusions. One of the roles of a state's highest court is to reconcile discrepancies in lower court opinions. The highest courts decisions are binding on all other courts within its state court system but not on federal courts or the courts of other states.

1.4 ELEMENTS OF A JUDICIAL DECISION

Trial courts sometimes, intermediate courts often, and highest courts usually conclude their proceedings by issuing a written opinion. Judicial opinions are comprised of a set of components or elements that provide the information necessary to understand a court's decision concerning who won the case and why. A standard opinion contains the following elements: the case name, a review of the facts, a restatement of the claims and arguments of both sides, a review of the case's procedural history, a statement of the issue(s), a ruling on the issue(s), a justification for each ruling, and the disposition.

CASE NAME

Almost all cases are named for the adversaries or **parties** to the case. The person who brings a suit to trial is called the **plaintiff** or sometimes the **complainant**, and the person or governmental unit against whom the suit is brought is the **defendant** or **respondent**. In trial court opinions, the name of the case is in the form *Plaintiff v. Defendant* (e.g., *McLaughlin v. Central School District No. 21*). If the case is appealed, the initiator of the appeal (the loser of the previous round) is called the **appellant** or the **petitioner** and the other party, the **appellee** or **respondent**. In the federal system and most other courts, the case name now lists the appellant first and the appellee second (e.g., *Central School District No. 21 v. McLaughlin*).

FACTS

A court's statement of the facts of the case recounts who did what to whom, when, where, how, and why. The court describes the conflict between the parties as determined from the evidence presented at trial. Although occasionally these descriptions are human dramas of high emotion, often the facts are merely descriptions of laws or policies adopted by a governmental entity and a discussion of their effects.

CLAIMS

The opinion may next review the objectives or goals of the two parties and the arguments offered in support of their claims. For example, if the parties disagree about the correct interpretation of a statute, the decision will reprint the part of the statute in dispute and discuss the contentions of the parties regarding the meaning of the statute.

PROCEDURAL HISTORY

Opinions usually include a review of the motions, counter-motions, and other legal maneuvers of the parties as well as the previous decisions of lower courts in the case. For example, a decision of a highest court may indicate that the trial court ruled for the plaintiff and why and that the intermediate appellate court reversed the decision and why.

ISSUES

In every case the parties disagree about the facts or on the proper application of the law to the facts. The questions raised by these disagreements are the issues of the case. The outcome depends on the court's answers to the issues. Some cases raise both issues of fact and issues of law. For example, a case may turn on the following two questions: whether the teacher was present in the room when the student was hurt and what level of supervision the law requires a teacher to give students. Some opinions explicitly state the issues as the court sees them, but others are less forthcoming and leave it to the reader to work out the issues.

Often courts facilitate their analysis by dividing a large complex issue into a series of smaller ones. These smaller issues may be organized in a logical sequence analogous to a flow chart. For example, a court may first decide whether the actions of the plaintiff are of the type protected by the free speech clause. If the answer is yes, then it must next determine whether the defendant met the appropriate standard for controlling free speech.

RULINGS AND JUSTIFICATION

The main body of the opinion contains the answers to the issues and the rationale or reasoning supporting each ruling. There may not be a clear separation of rulings and justifications, so again sorting these out may be up to the reader.

Rulings are also referred to as **holdings**, **findings**, or **conclusions of law**. A brief statement encapsulating the material facts and major conclusions of law may also be referred to as the holding of the case. Rulings interpreting a constitutional provision or other law may provide **principles**, **rules**, **standards**, or **doctrine** to guide the application of the law in related situations.

Courts arrive at their rulings through deductive reasoning with the relevant facts and rules of law as premises. The deductive argument also provides the justification for the decision. A simple example:

> Premise 1 (factual finding): X was driving at 40 mph on Main St.
>
> Premise 2 (rule of law): The speed limit on Main St. is 30 mph and exceeding this speed limit is the legal wrong of speeding.
>
> Conclusion (ruling): X has committed the legal wrong of speeding.

The cases in this book, however, are never so simple because, although the facts may be well known, the application of the relevant legal rules, principles, or tests is not clear-cut. For example, if the legal rule required that drivers maintain a reasonable speed rather than specifying a precise speed limit, the issue of whether X was speeding would be more difficult to decide.

DISPOSITION

Having determined the winner of a legal dispute and explained its rationale, the court concludes its opinion with an order dictating what must be done consistent with the holdings in the case. If the defendant wins a trial, the trial court will simply dismiss the case and perhaps order the plaintiff to pay court and legal fees. If the plaintiff wins, the trial court will fashion a remedy for the injustice the plaintiff has suffered. Depending on the type of case, the law may permit various forms of remedy including payment of money damages, issuance of an injunction or order requiring public officials to cease prohibited practices or perform mandated duties, or other relief specifically fashioned to undo the wrong. In some cases, the court may order further proceedings to decide on an appropriate remedy. An appellate court can conclude a case by affirming or upholding the trial court decision, modifying it in some respect, or reversing the trial court. In the latter case, the court may either issue an order of its own or remand the case back to the trial court for additional proceedings consistent with its ruling. Many cases are remanded for procedural reasons with the outcome no longer in doubt.

* * *

Interpreting judicial opinions is a subtle and imprecise act. Lawyers and judges in later cases argue over the meaning of precedents just as they argue over the meaning of statutes and constitutional provisions. For example, a court may have ruled against starting the school day with an organized prayer, but does this ruling preclude a moment of silence?

One common pitfall is to confuse the holdings of a court with the **dicta** that surround it. Dicta, which may be defined as "side comments," are parts of an opinion not necessary to the outcome. Opinions often include commentaries concerning issues and hypotheticals related to the case under consideration. For example, the opinion in a speeding case might say: "Although a life and death emergency might justify exceeding the speed limit, there was no emergency here." This is dicta and concluding that drivers are authorized to exceed the speed limit in life and death emergencies would be wrong.

1.5 LEGAL CITATIONS

Citations to judicial opinions are in the form of a series of numbers and abbreviations following the case name that indicate where the opinion may be found. The books that report court decisions, known as case reporters, are generally found only in law libraries and other specialized locations. Additionally, the full text of published federal and state court decisions as well as federal and state statutes and regulations of government agencies can be found at various sites on the Internet. A good starting point for locating cases and other legal research is http://www.findlaw.com. Other useful sites include: http://www.farislaw.com; http://www.ed.gov; http://www.law.cornell.edu; and http://www.law.house.gov.

Case citations all follow the same basic format. An example of a citation for a U.S. Supreme Court opinion with each of its elements identified is as follows:

Keyishian v. Board of Regents,	385	U.S.	589	(1967)
Name of Case,	Volume	Case Reporter	Page	(Year Decided)

This case is found on page 589 of volume 385 in the set of books known as *United States Reports*, always abbreviated "U.S." in case citations (see Table 1.2). Although the year is given, the case can be found without it. *United States Reports* is the official government publication of Supreme Court opinions. Additionally, several private case reporters also publish Supreme Court opinions. The most commonly cited of these is the *Supreme Court Reporter* (S. Ct.). For example, the *Keyishian* case may be cited 87 S. Ct. 675 indicating that the opinion may be found on page 675 of volume 87. The *United States Reports* citation should be used unless it is not yet available.

Citations to lower federal courts give the same information as Supreme Court citations and give the abbreviated name of the specific circuit or district court in parentheses before the date although this information is not necessary to find the case. An example of a federal circuit court of appeals decision from the Fifth Circuit is:

Tomkins v. Vickers, 26 F.3d 603 (5th Cir. 1994).

An opinion from the district court of the Northern District of Illinois would be:

Olesen v. Board of Education, 676 F. Supp. 820 (N.D. Ill. 1987).

TABLE 1.2 Reporters for Federal Court Decisions

Abbreviation	*Title*	*Courts Reported*	*Publisher*
U.S.	United States Reports	Supreme Court	U.S. government
S. Ct.	Supreme Court Reporter	Supreme Court	West Publishing Co.
L. Ed.2d	Lawyers' Edition, second series	Supreme Court	Lawyers' Cooperative
F.3d	Federal Reporter, third series	Circuit Courts	West Publishing Co.
F. Supp.2d	Federal Supplement, second series	District Courts	West Publishing Co.

Citations to lower federal court decisions may also include additional information about the subsequent actions of higher courts. For example, in *Uzzell v. Friday*, 547 F.2d 801 (4th Cir. 1977), *cert. denied*, 446 U.S. 951 (1980), the last part of the citation indicates that the Supreme Court "denied certiorari," meaning it refused to review the case. The official denial is reported in *United States Reports* as cited. Other citations might include a notation that the decision was subsequently affirmed (*aff'd*) or reversed (*rev'd*).

State case citations follow the same format but they have their own case reporters. Although the states publish their own case reporters, the most readily available source of state appellate court decisions is the regional reporters published by West Publishing Company. Seven regional reporters cover groups of states (see Table 1.3). The information in parentheses indicates the state and year for cases heard in state highest courts or a more complete court name for other cases. Some sources employ a double or even triple citation ("parallel citation") also listing the official state-published reporters, but, in keeping with current standard style, this volume only uses the citation to the regional reporter.

Statutory citations are similar to cases, but a section (§) number is given instead of a page. Federal statutes may be cited to the *United States Code* (U.S.C.), the preferred source; to the *Statutes at Large* (Stat.); or to the *United States Code Annotated* (U.S.C.A.). For example, 42 U.S.C. §2000d (1981) refers to section 2000d in volume 42 of the edition of *United States Code* published in 1981. Some case books and textbooks, including this one, omit the years from statute citations because the volume and section numbers are the same in every edition of statutes. A federal statute might also be referred to by its popular name, such as the "Individuals with Disabilities Education Act," followed by the citation.

Each state has its own specialized notation for citations to state statutes, but most follow a format similar to federal. In some states there is more than one possible source and citation for the same statute.

TABLE 1.3 Regional Reporters

Abbreviation	*Title*	*States*
A.2d	Atlantic Reporter, second series	Connecticut, Delaware, District of Columbia, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont
N.E.2d	North Eastern Reporter, second series	Illinois, Indiana, Massachusetts, New York, Ohio
N.W.2d	North Western Reporter, second series	Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin
P.2d	Pacific Reporter, second series	Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, Wyoming
S.E.2d	South Eastern Reporter, second series	Georgia, North Carolina, South Carolina, Virginia, West Virginia
S.W.2d	South Western Reporter, second series	Arkansas, Kentucky, Missouri, Tennessee, Texas
So.2d	Southern Reporter, second series	Alabama, Florida, Louisiana, Mississippi

Federal regulations are published in the *Code of Federal Regulations* (C.F.R.) and in the *Federal Register* (Fed. Reg.). Citations give the volume, abbreviation, section or page, and (sometimes) year of publication, such as 34 C.F.R. 106.12 (1996) or 62 Fed. Reg. 12038 (1997).

Complete information concerning legal citations may be found in *The Blue Book: A Uniform System of Citation* (16th edition), published by the Harvard Law Review Association in 1996. New editions are usually published every five years.

1.6 SUMMARY

The law plays a part in everything that educators do. Some practices are required by law, some are prohibited, and the rest are permitted. The law of education comes in a variety of forms: constitutional provisions, statutes, regulations, common law, and policies. Some of the law originates at the federal level, some at the state, and some policies are formulated by local school boards with authority delegated by the state.

Regardless of the origin of a law, it falls to the courts to interpret it and apply it to specific disputes. Courts also resolve inconsistencies between laws and rule on the validity of laws that might contradict higher authority. Ultimately, case law provides the official meaning of laws.

There is a federal judiciary and each state has its own judicial system. The organization of the judicial systems at both levels consists of trial courts and two levels of appellate courts, intermediate and highest. In the federal system, these are known as district courts, circuit courts of appeal, and the Supreme Court. Trial courts hear evidence, determine facts, and apply the law, whereas appellate courts correct errors of law at lower levels. Appellate courts, especially the highest courts, focus on issues of broad significance. Their majority opinions make law within their area of jurisdiction.

Most written court decisions contain certain common elements. The facts of the case are the events and actions that created the dispute under consideration, and the issues are the disputed questions of law or fact. The holdings of the court explain and justify its decisions. Holdings set precedent for future cases. Published court decisions as well as laws and regulations are cited according to a uniform system of legal notation.

CHAPTER 2

COMPULSORY EDUCATION

In every state, parents and children are subject to laws requiring young people to attend public school or a state-approved alternative. These laws specify who must attend school, the period of mandatory attendance, and the types and characteristics of schools that may be used to satisfy the requirement of compulsory attendance. In some states, local school administrators are charged with enforcing the compulsory education laws. This responsibility may involve seeking out and initiating legal action against chronically truant children and their parents and evaluating the acceptability under the law of private educational alternatives.

When parents choose to send their children to local public schools, as most do, another set of legal issues may arise. State law and school board policies create residency and other requirements for eligibility to attend a particular public school, and local school administrators often must interpret and enforce these requirements. The most legally and educationally troublesome outcome of compulsory attendance laws is that some children find themselves in public schools where they are exposed to teachings that violate their parents' or their own basic beliefs. This exposure raises constitutional and moral issues and sometimes results in litigation.

This chapter explores the legal issues related to compulsory education, beginning with an overview of compulsory education laws and the rationale and justification for their existence. Subsequent sections consider the circumstances in which certain individuals or groups of students may be exempt from compulsory attendance laws and public school admission requirements. The chapter's last two sections look at the state's power to promote the aims of compulsory education by regulating private schools and at the state's authority to aid private schools.

2.1 COMPULSORY EDUCATION LAWS: AN OVERVIEW

Laws designed to ensure that children receive a government-approved education constitute the single greatest intrusion on the general right of parents to direct the upbringing of their children and the single greatest restriction on the general right of all Americans to spend their time in pursuits of their own choosing. Nevertheless, these laws have been justified by a variety of arguments. The few compulsory education laws of the colonial period were created for religious reasons: People who could not read the Bible were considered vulnerable to satanic influence. During the early days of the republic, proponents of enforced universal schooling argued that a democratic form of government could not survive without an educated citizenry. By the end of the nineteenth century, when most states passed their first enforceable compulsory education laws, required school attendance was viewed as a way both to promote democracy and to protect both children and adult jobs by limiting child labor. More recent arguments tend to focus on the notion that education is prerequisite to productive participation in the modern economy.

Although compulsory attendance laws vary from state to state, most have certain features in common. They typically include:

- The ages, most often seven through sixteen, when children are required to attend some form of education. Some states require attendance beginning at age six and several extend the requirement to eighteen unless the child has graduated from high school.
- The types of education that may be used to satisfy the compulsory education law. In all states, these include public schools and private schools that meet certain requirements and, in some states, home instruction and private tutoring as well.
- The ages of pupils the public schools must serve. In most states, the law compels schools to serve pupils who are older than those required to attend and, in some states, the law also compels schools to serve pupils who are younger than those required to attend.
- The length of the school year and school day and the minimum attendance required. These figures may vary for public schools, private schools, and home instruction.
- The bases for granting exemptions from compulsory attendance requirements. In some states, these bases may include conditions such as remoteness of residence that make school attendance impossible or impractical and limited exemptions for members of certain religious groups.
- Provisions for the appointment of attendance officers with specified authority to enforce compulsory education laws.
- Provisions for criminal and noncriminal judicial proceedings and penalties to deal with violations of the law. Parents who fail to make an effort

to send their children to school may face fine or imprisonment or the loss of their children pursuant to charges of neglect. Children who refuse to attend may be found delinquent or declared persons in need of supervision. They may be put on probation, placed in a foster home, incarcerated in a special juvenile facility, or otherwise placed under the care and control of the court. Some states now enforce their compulsory education laws by denying driver's licenses to children under eighteen not attending school.[1]

The common law of the late eighteenth and early nineteenth centuries afforded parents virtually unlimited control over their children. Thus, when enforcement of compulsory schooling laws began, parents sometimes challenged the laws' constitutionality on the grounds that the laws usurped legally recognized parental prerogatives. State courts usually rejected these challenges citing the state's compelling need to ensure an educated citizenry or, less frequently, the rights of children to receive the educational services offered to them by state law.[2]

It is now beyond question that parents do not have a constitutional right to be totally free from state regulations regarding the upbringing of their children.[3] Nor is the state's authority to insist that children receive some form of education any longer in doubt. Claims by parents that compulsory attendance laws violate due process, equal protection, freedom of speech, freedom of assembly, or privacy rights have been dismissed by the courts.[4] A claim that a state compulsory education law requiring persons having control of a child to "cause the child to attend school regularly" was unconstitutionally vague has also been rejected.[5]

However, the Constitution still places significant limitations on state compulsory education laws. The most important of these is that states may not require that a child attend a public school. On the contrary, as the following case establishes, parents have a constitutional right to satisfy their duty to educate their children by sending them to a private school.

PIERCE v. SOCIETY OF SISTERS

Supreme Court of the United States, 1925
268 U.S. 510

Mr. Justice McReynolds delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining appellants from threatening or attempting to enforce the Compulsory Education Act adopted November 7, 1922 . . . by the voters of Oregon. They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the Federal Constitution were specially set up, and appropriate prayers asked for their protection.

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[1] Means v. Sidiropolis, 401 S.E.2d 447 (W.Va. 1990).

[2] State v. Hoyt, 146 A. 170 (N.H. 1929); State v. Bailey, 61 N.E. 730 (Ind. 1901).

[3] Prince v. Massachusetts, 321 U.S. 158 (1944).

[4] Concerned Citizens for Neighborhood Sch. v. Board of Educ. of Chattanooga, 379 F. Supp. 1233 (E.D. Tenn. 1974).

[5] State v. White, 509 N.W.2d 434 (Wis. Ct. App. 1993).

The challenged Act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between eight and sixteen years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor. . . . The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business, and greatly diminish the value of their property.

Appellee, the Society of Sisters, is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between eight and sixteen. In its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative—the annual income from primary schools exceeds thirty thousand dollars—and the successful conduct of this requires longtime contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined, the corporation's business and property will suffer irreparable injury.

Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of five and twenty-one years. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the State Board of Education. Military instruction and training are also given, under the supervision of an Army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs long-time contracts must be made for supplies, equipment, teachers, and pupils. Appellants, law officers of the State and County, have publicly announced that the Act of November 7, 1922, is valid, and have declared their intention to enforce it. By reason of the statute and threat of enforcement, appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for future instruction of their sons, and some are being withdrawn.

The Academy's bill states the foregoing facts and then alleges that the challenged act contravenes the corporation's rights guaranteed by the Fourteenth Amendment, and that unless appellants are restrained from proclaiming its validity and threatening to enforce it, irreparable injury will result. The prayer is for an appropriate injunction.

No answer was interposed in either cause, and after proper notices they were heard by three judges . . . on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property, and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that appellees' schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage, and thereby destroy appellee's business and property. Finally, that the threats to enforce the Act would continue to cause irreparable injury; and the suits were not premature.

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. . . . But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. . . .

Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Plaintiffs asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in many cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity.

The decrees below are affirmed.

◆

The *Pierce* Court based its decision on the Due Process Clause of the Fourteenth Amendment. This clause prohibits state actions that "deprive any person of life, liberty, or property without due process of law." Due process is a very elastic and sometimes abstract concept used by courts to protect a variety of individual interests against improper or unjustified government intrusion. In *Pierce*, the Court protected the property interest of private schools to remain in business and the liberty interest of parents to control the upbringing of their children. Although the Court recognized the state's need to ensure that all children receive an education, the justification for required public school attendance was not strong enough to overcome these interests.

An understanding of *Pierce* is confounded by the fact that the Court's interpretation of the Due Process Clause has changed since 1925. Today the Clause is no longer used to limit government regulation of business, so the question arises whether today's Supreme Court would uphold a compulsory public schooling law. Although it can't be known for sure, the Court's continued recognition of the right of parents to exercise reasonable if not total control of their children's upbringing might be sufficient to reaffirm *Pierce*. Moreover, the Court might view a public-school-only law as a violation of the free speech rights of parents, teachers, and private schools. In any case, the right of private schools to exist and the general right of parents to choose private schooling for their children is not likely to be seriously questioned in the foreseeable future.

This does not mean, however, that parents may satisfy their obligation to have their children educated by sending them to any school they choose. On the contrary, the *Pierce* Court recognized that for the state to satisfy its need for an educated citizenry, some regulation of private schools would be necessary. The types and extent of regulation that states may constitutionally impose on private schools is an area of continued controversy. These issues are considered in sec. 2.4.

2.2 EXEMPTIONS FROM COMPULSORY EDUCATION

Three general categories of exceptions to the requirements of compulsory education laws have been recognized. First, some students must be excused from some of the requirements of compulsory schooling for constitutional reasons. Second, some states' statutes provide exemptions for certain categories of children. Third, state courts have sometimes accepted idiosyncratic reasons for failing to comply with compulsory education laws. Each of these categories is very limited in scope.

CONSTITUTIONALLY REQUIRED EXEMPTIONS

A large number of cases have asked the courts to deal with conflicts between state laws designed to promote the goals of compulsory schooling and freedom of religion. Parents who initiate these cases generally accept the notion that their children should be educated but claim that certain aspects of the education that the state forces their children to receive violate the Free Exercise Clause of the First Amendment. The best-known case of this type, *Wisconsin v. Yoder*, is also one of the few where the parents prevailed.

WISCONSIN v. YODER

Supreme Court of the United States, 1972
406 U.S. 205

Mr. Chief Justice Burger delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions of violating the States compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade. The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law, and they are conceded to be subject to the Wisconsin statute.

On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each. Respondents defended on the ground that the application of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments. The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith. . . .

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. . . .

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. . . .

I.

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, *e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations."

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to over-ride the interest claiming protection under the Free Exercise Clause. . . .

II.

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent.

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demand of Religion Clauses.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world. . . ." This command is fundamental to the Amish faith. . . .

The impact of the compulsory-attendance law on respondent's practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious belief. Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondent's religious beliefs.

III.

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion. . . .

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of that State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. . . .

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. . . .

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. . . .

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

The State attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. . . .

It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified high school because it comes at the child's crucial adolescent period of religious development. Dr. Donald Erickson, for example, testified that their system of learning-by-doing was an "ideal system" of education in terms of preparing Amish children for life as adults in the Amish community. . . .

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but allow them to grow in "ignorance." To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an "ideal" vocational education for their children in the adolescent years.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.

When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the ideal of the democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by the completion of the elementary grades, at least where the child was regularly and lawfully employed. The independence and successful functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional, compulsory attendance would entail. . . .

IV.

Finally, the State, on authority of *Prince v. Massachusetts*, [321 U.S. 158 (1944)], argues that a decision exempting Amish children from the States requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as parens patriae to extend the benefit of secondary education to children regardless of the wishes of their parents. Taken at its broadest sweep, the Court's language in *Prince*, might be read to give support to the State's position. However, the Court was not confronted in *Prince* with a situation comparable to that of the Amish as revealed in this record; this is shown by the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult. The Court later took great care to confine *Prince* to a narrow scope in *Sherbert v. Verner* [374 U.S. 398 (1963)], when it stated:

> On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.

This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence. . . .

The duty to prepare the child . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship. *Pierce*, of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society. . . .

V.

For the reasons stated we hold, . . . , that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. . . .

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.

Affirmed.

* * *

The First Amendment of the Constitution states that government "shall make no law . . . prohibiting the free exercise" of religion. *Yoder* is typical of cases involving allegations that a government regulation violates this guarantee. The *Yoder* plaintiffs sought exemption from a generally applicable law, compulsory education, on the grounds that to fulfill the requirements of the law would violate the obligations of their religion.

As in other free exercise cases, the *Yoder* Court's approach involved balancing the religious interests of the plaintiffs against the state's interests in enforcing the law. First, the Court imposed on the plaintiffs the burden of proving that: their claim was religious, not merely philosophical or moral; their belief was sincere, not a ruse to avoid an onerous law; and the law had a severe impact on the exercise of their religion. Only after the Amish had met their burden of proof did the Court examine the state's asserted interests to determine if those interests were strong enough to justify infringement on the free exercise rights. The state would have prevailed if it had been able to convince the Court that enforcement of the law was necessary to the achievement of a compelling state interest. In *Yoder*, however, Wisconsin was unable to do so.

Despite its outcome, *Yoder* constitutes a strong affirmation of the basic principle of compulsory schooling. The Court did not allow the Amish to avoid all schooling, only the last two years, and it based its decision in part on the fact that the Amish children were participating in a well-developed educational experience, albeit a very different one from the public schools. The Court also signaled a strong presumption in favor of compulsory schooling by wording its opinion to make it inapplicable to virtually any group other than the Amish.

Nevertheless, religious groups other than the Amish have at times received partial exemptions from some of the obligations of compulsory schooling. In *Church of God v. Amarillo Independent School District*,[6] the court considered the issue of whether a school is compelled by the Constitution to excuse the absences of students who miss school to fulfill religious obligations.

The case was brought by twenty-four students who were members of the Worldwide Church of God. In order to fulfill the requirements of their religion, the students were obliged to be absent from school for ten to twelve days per year, including seven consecutive days to attend a religious convocation, but the school district had recently adopted a policy that imposed serious academic penalties on any student who missed more than two days per year for religious reasons. The students argued that the new policy was an unconstitutional violation of their First Amendment right to free exercise of religion.

The court began its analysis by pointing out that a law or policy will not necessarily pass constitutional muster just because it is facially neutral in the sense that it applies to all religions equally. The Free Exercise Clause may be used to object to laws that are "fair in form, but discriminatory in operation." An otherwise valid law that burdens the requirements of a specific religion will be declared unconstitutional unless the state can demonstrate a compelling reason for its enforcement.

Next, employing the standard mode of free exercise analysis described above, the court concluded (a) that the students' belief that they had to miss school for religious observance was religious because it originated in the official doctrine of their church and its interpretation of the Bible, (b) that the belief was sincere as indicated by the students' willingness to suffer significant academic penalties rather than violate their religious obligation, and (c) that enforcement of the policy would have a severe impact on the students' exercise of their religion because they could not meet their religious obligations without significantly damaging their academic record.

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[6] 511 F. Supp. 613 (N.D. Tex. 1981).

Finally, the court turned to the question of whether the district's reasons for its attendance policy were sufficient to justify the burden that the policy placed on student members of the Church of God. The district offered two reasons for its policy: that "regular attendance in public school is necessary for a student's academic development" and "that accommodating the holy days of various and diverse religious groups would work an unreasonable burden on the teachers." To evaluate the first reason, the court looked to the *Yoder* decision:

> The school district's interest in [the attendance policy] does not approach the magnitude of the state's interest in *Wisconsin v. Yoder*. Here we are not concerned with a religious sect that insists on keeping their children away from school. We are concerned only with the effect of a handful of absences on the Plaintiffs' academic development. This interest, standing alone, does not justify the burden placed on the free exercise of religion.

Regarding the second reason, the court noted that no teacher had ever complained about the work created by the prior more permissive attendance policy and that teachers routinely provided and evaluated make-up work for students who missed class for sickness and sports. Thus, the court concluded that the district's attendance policy was an unconstitutional violation of the students' right to free exercise of religion.

Although the *Church of God* court rejected the district's contention that its attendance policy was necessary to the accomplishment of its educational goals, the opinion, like *Yoder*, strongly affirms the importance of compulsory attendance: "The state's responsibility for the education of its citizens ranks at the apex of [its] functions. . ." Therefore, *Church of God* seems to imply that there is a limit on how much religiously-motivated absence a school would have to tolerate, but it provides little guidance as to the magnitude of that limit. If *Church of God* doctrine had required a month-long convocation or a weekly day off for religious observance, would the students still have prevailed? It seems unlikely, but we cannot be sure, just as we cannot know whether it would have made a difference if the teachers and administrators had complained strongly about the extra work required to accommodate the students' absences. Presumably there is some number of absences or some level of extra burden to a school great enough to outweigh a free exercise claim.

The issues raised but not resolved by *Yoder* and *Church of God* have been further confounded by subsequent Supreme Court and Congressional action. In *Department of Human Resources of Oregon v. Smith*,[7] the Court took a much stricter approach to free exercise claims than *Church of God*. The *Smith* Court ruled that the Constitution is not violated by generally applicable laws that have an incidental, that is, unintentional, effect of burdening the free exercise of religion. This would seem to imply that school districts and states are now free to enforce the kind of policy struck down in *Church of God* or the compulsory attendance laws objected to in *Yoder*. However, the *Smith* opinion goes on to state that free exercise claims are to be given greater weight when they involve "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children." The Court approvingly cites *Yoder* as exemplifying this principle so perhaps rulings like *Church of God* are still valid as long as they involve parents' as well as students' desire to miss school for religious observance.

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[7] 494 U.S. 872 (1990).

In response to the *Smith* opinion, Congress in 1993 passed the Religious Freedom Restoration Act (RFRA)[8] prohibiting government at any level from enforcing generally applicable laws that burden the free exercise of religion unless the burden is the least restrictive means of furthering a compelling government interest. Presumably, this law would have prohibited states from enforcing any limit on student absence for religious observance as long as any possible method of allowing absent students to make up for lost work could be conceived. However, in its most recent free exercise decision, the Supreme Court found the RFRA unconstitutional because it violated the Constitution's limit on the federal government's power to control the actions of the states.[9]

STATUTORY EXEMPTIONS

A state's compulsory education law may excuse specified categories of students from the law's requirements. Some states' statutes exempt children living more than a specified distance from the nearest school, employed children of specified age, minor parents, minor parents lacking access to appropriate child care, or certain categories of disabled children. Some states specifically exempt Amish children after a certain grade or, more generally, children who for bona fide religious reasons are opposed to school attendance.[10] Children within the exempt categories cannot be forced to attend school and their parents cannot be penalized for failing to send them to school. Typically the burden of proof is on the parents to show that the exemption applies.

Conversely, the fact that a student fits into one of the exempt categories does not release the state or school district from the obligation to provide schooling if the child chooses to attend. In the case of disabled children, other federal and state statutes require the state to provide an education even if the child or parents do not want one (see chap. 7).

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[8] 42 U.S.C. §2000bb-1.

[9] City of Boerne v. Flores, 521 U.S. 507 (1997).

[10] Johnson v. Prince William County Sch. Bd., 404 S.E.2d 209 (Va. 1991).

JUDICIALLY RECOGNIZED EXEMPTIONS

In a few cases, married girls desiring to work full-time in their homes have succeeded in convincing courts to exempt them from compulsory attendance. These cases are older and of questionable relevance today.[11] In other cases, parents and children have sought to defend themselves against charges of violating compulsory education laws by asserting an objection to the conditions at the local public school. The courts have generally rejected these claims when the basis of the objection was the school being disproportionately of one race or a general dissatisfaction with the quality of the educational program.[12] Children have occasionally prevailed, however, by establishing that conditions at the school pose a significant health and safety risk to them.

In one such case, *In re Ian D.*,[13] a boy was accused in family court of violating his state's compulsory education laws when he failed to attend school for more than 100 days of a school year. At his trial, Ian testified that he was unable to attend school because of constant abuse and ridicule from other students and that "his repeated pleas to school authorities for protection and assistance resulted in no meaningful action." Moved by this testimony, the court ruled in Ian's favor, citing the so-called "choice of evils" doctrine that permits violations of criminal statutes necessitated by exigent circumstances. The court also ordered the board of education to transfer Ian to another school where he could make a fresh start.

In addition to affirming an unusual exception to compulsory schooling, *Ian D.* raises the important issue of the extent to which a school has a legal obligation to protect a student from bullying and harassment by other students. An implicit premise of the opinion seems to be that the state had an obligation to provide Ian with a safe school (see also, sec. 6.8 and 12.4). While absolving Ian of wrongdoing, the opinion was critical of school and other state officials who failed to act on his behalf: ". . . [I]f anyone is to bear the stigma of this case, let it fall where it rightly belongs, on those who saw [Ian's] tears and simply walked away." The court also did not absolve Ian's parents of their obligation to provide for his education and indicated that it would act positively on a neglect petition against the parents.

2.3 ADMISSION REQUIREMENTS AND SCHOOL ASSIGNMENT

It was once common for state laws to exclude certain categories of disabled children from admission to public schools. Earlier cases generally upheld these laws on the grounds that the children could not benefit from education or that their presence would be detrimental to the learning of others.[14] Today, exclusion of the disabled from school would be considered a violation of federal and state constitutional guarantees of equal protection and of several federal and state statutes (see chap. 7).

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[11] *In re* Rogers, 234 N.Y.S.2d 172 (N.Y. Fam. Ct. 1962).

[12] Janet Boeth Jones, Annotation, *Conditions at School as Excusing or Justifying Nonattendance*, 9 A.L.R. 4th 122 (1981).

[13] 439 N.Y.S.2d 613 (N.Y. Fam. Ct. 1981).

Three other categories of public school admission requirements continue to be found in state law: age, health-related, and residency.

AGE REQUIREMENTS

All states' laws establish a minimum and maximum age of children eligible to receive an education in the public schools. Typically, children must be five by a specified date in order to start kindergarten, six by a specified date in order to start first grade, and may not start a year of schooling once they have reached a specified age, often twenty-one. Parents have challenged age requirements as a violation of the Fourteenth Amendment's Equal Protection Clause, but the courts have rejected their arguments.[15] A state court in Texas rejected a parental claim that a school was obliged to hold a hearing to determine their underage child's readiness for first grade before preventing the child from attending.[16]

HEALTH-RELATED REQUIREMENTS

Most states require a medical examination and certain specified immunizations as a condition of admission to public school. Some parents have argued that mandatory immunization is a violation of their right to free exercise of religion, but the courts have uniformly held that the state's interest in preventing communicable disease is compelling and overrides the parents' interest.[17]

Despite the fact that accommodation of religious beliefs regarding immunization is not a constitutional requirement, the law in a number of states permits parents to claim religious exemptions. Nebraska permits this exemption, yet a Nebraska state court upheld the authority of school officials, in response to an outbreak of measles, to exclude nonimmunized children from school for a week. The time away from school was deemed an excused absence, and the school offered to provide tutors during the period of exclusion.[18] The opinion illustrates a common theme in education law cases: the great importance given to protecting the health and safety of students.

The voluntary granting of religion-based exemptions to mandatory vaccination raises three issues. First, does accommodating religion in this manner amount to an endorsement of religion in violation of the Establishment Clause of the First Amendment? The courts have said that it does not and permitted the exemption.[19] Second, does exempting only children in a "recognized church or religious denomination" violate the Establishment Clause requirement of government neutrality regarding different religious beliefs? The courts have split, and more recent cases tend to find the limitation impermissible.[20] Third, under what specific circumstances should the exemption be recognized? Here, the courts usually have followed a mode of analysis analogous to the one used to test religion-based claims in free exercise cases.[21]

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[14] State v. Board of Educ. of Antigo, 172 N.W. 153 (Wis. 1919).

[15] Hammond v. Marx, 406 F. Supp. 853 (D. Me. 1975); *see also* Sec. 7.5.

[16] Wright v. Ector County Indep. Sch. Dist., 867 S.W.2d 863 (Tex. App. 1993).

[17] Zucht v. King, 260 U.S. 174 (1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Brown v. Stone, 378 So. 2d 218 (Miss. 1979).

[18] Maack v. School Dist. of Lincoln, 491 N.W.2d 341 (Neb. 1992).

In one such case, *Lewis v. Sobel*,[22] the court insisted that a state law requiring "that a student whose parents' religious convictions are to the contrary be excluded from the immunization requirement" be applied in the case of a family whose nonmainstream spiritual beliefs caused them to reject preventive medication. Employing standard free exercise analysis, the court found that although the parents did not belong to an organized church, their beliefs were religious; that the parents' beliefs were sincerely held because they permeated every facet of their lives; and that the immunization requirement burdened their religious beliefs even though they had on one occasion wavered from their opposition to vaccination. Besides ordering the child's admission to school, the court took the unusual step of awarding monetary damages to the family for the emotional distress suffered when school officials unlawfully excluded the child.

RESIDENCY REQUIREMENTS

Parents sometimes wish to transfer their children out of their home district for educational, philosophical, social, or other reasons. Many states either prohibit school districts from admitting nonresidents or place significant limitations on interdistrict transfers. In *Martinez v. Bynum*,[23] the Supreme Court upheld the residency requirement as constitutionally permissible. When students are allowed to transfer, parents or, in some circumstances, the students' home district may be required to pay tuition. In some states parents are not usually allowed to transfer their children without approval of both the sending and receiving districts no matter what the basis of their objection to their home district's schools. However, at least six states permit students to attend schools in any district that declares itself open to students from outside its boundaries unless the racial balance in districts under a court desegregation order is adversely affected.

The issue of residency is significant not just in connection with access to a district's schools but also to determine financial responsibility for the education of children placed in special residential programs for the disabled or juvenile care facilities by order of a court. Under these circumstances, most states hold the district of the child's residence financially responsible, but the criteria for determining residency vary somewhat from state to state. In most states, unless the minor is emancipated, the rebuttable presumption is that the residence of the minor is determined by the residence of the parent. When parents are divorced, the presumption is that the residence of the child is that of the parent with legal custody.[24] The parents' residence in most circumstances is the place where they actually live.

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[19] Brown v. City Sch. Dist., 429 N.Y.S.2d 355 (Sup. Ct. 1980), *aff'd*, 444 N.Y.S.2d 878 (App. Div. 1981).

[20] Davis v. State, 451 A.2d 107 (Md. 1982); Maier v. Besser, 341 N.Y.S.2d 411 (Sup. Ct. 1972).

[21] *See*, Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81 (E.D.N.Y. 1987).

[22] 710 F. Supp. 506 (S.D.N.Y. 1989).

[23] 461 U.S. 321 (1983).

Determining a child's residence is more complicated for children not living with a parent. Generally, a child is presumed to be a resident of the district where the parent lives even if the child is physically living in another district.[25] However, the presumption may be rebutted, for example, by establishing that the child lives with a legally designated guardian, in which case the child's residence is that of the guardian. Foster parents and residential institutions can be designated as legal guardians. However, some courts have held that a child does not satisfy residency requirements if the custodial adult merely has power of attorney and not actual guardianship of the child.[26] The Michigan Supreme Court has taken a different view. Seeking to protect the right of children to a free public education under state law, the court ruled that a child who lives with an adult having power of attorney may qualify for residency in the district where the adult lives.[27] If a child with a legal guardian actually lives with a natural parent, the child's residence remains that of the parent.[28] State laws treat different classifications of institutionalized children differently and may distinguish between residency standards for admission purposes and for financial responsibility purposes.

Under the laws of most states, a child can establish residency in a district other than the one where the parents live even when living with someone who is not a legal guardian. Thus, one court ruled that a child who boarded in a district away from his custodial parent for health reasons satisfied school residency requirements.[29] However, schools are not usually required to admit children who reside in the district primarily for the purpose of attending school.[30]

Residency requirements pose a potential obstacle to the education of the nation's homeless children. The problem came to a head in New York when the state commissioner ruled that a homeless child's residence was the former school district, but the courts ruled that residency was determined by where the child was currently sheltered.[31] In the midst of this uncertainty, Congress stepped in and enacted the McKinney Homeless Assistance Act of 1988.[32] This Act provides federal assistance to the states to deal with the homeless and requires the states to take steps to assure homeless children a free public education. The Circuit Court of the District of Columbia has ruled that the McKinney Act permits homeless children to sue governmental officials to obtain the educational rights guaranteed by the Act.[33] New York responded to the law by permitting the parents of homeless children to decide where they will attend school. Other states have adopted different plans. In the absence of a specific statute or regulation governing the residency of homeless children, residency should be considered the place where the child generally lives.

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[24] State *ex. rel.* Frasier v. Whaley, 234 N.W.2d 909 (Neb. 1975).

[25] *In re* Bryan L., 462 A.2d 108 (N.H. 1983).

[26] Joshua C. v. Western Heights Indep. Sch. Dist. No. 1-41, 898 P.2d 1324 (Okla. Ct. App. 1995).

[27] Feaster v. Portage Pub. Sch., 547 N.W.2d 328 (Mich. 1996).

[28] School Dist. No. 3 of Maricopa County v. Dailey, 471 P.2d 736 (Ariz. 1970) (en banc).

[29] Luoma v. Union Sch. Dist. of Keene, 214 A.2d 120 (N.H. 1965).

[30] School Dist. No. 1 in Milton v. Bragdon, 23 N.H. 507 (1851).

[31] Orozco v. Sobol, 674 F. Supp. 125 (S.D.N.Y. 1987) and 703 F. Supp. 1113 (S.D.N.Y. 1989).

[32] 42 U.S.C.A. §§11301-11489.

SCHOOL ASSIGNMENT WITHIN DISTRICT

School boards are required to provide an education to children residing in the district or participating in a legally sanctioned transfer program. With few legal constraints, however, school boards may assign their students to any school or program they choose. The most significant constraint is that pupils may not be assigned to schools on the basis of race or other criteria in violation of the Equal Protection Clause of the Fourteenth Amendment or federal civil rights statutes (see chap. 6). There is, however, no constitutional requirement that students be given a choice among a district's schools.[34]

One other rarely relevant constraint is that school districts may not abuse their discretion in the assignment of pupils. Thus, in one case, a court prohibited the reassignment of pupils from a school close to their homes to a school more than 40 miles away even though busing was provided.[35] In general, however, parents are not usually successful in getting the courts to require assignment to a school closer to home.[36]

In recent years, a number of school boards have responded to the call for greater parental choice in education by voluntarily initiating plans that permit children to attend any school within the district. A few states have adopted statutes requiring open enrollment within all districts.

2.4 GOVERNMENT REGULATION OF PRIVATE AND HOME SCHOOLS

It often falls to the courts to assess the constitutionality of state regulation of private alternatives to public schooling. To do so requires balancing the state's interests in ensuring the education of all children against the right of parents to direct the upbringing of their children. As the *Pierce* Court recognized, if states could not regulate private schools, they would have no way of ensuring that the goals of compulsory education are met. Private school students might receive a program limited to one particular subject or skill or they might be taught nothing at all. However, if the state's power to regulate private schools were unlimited, the authority of parents to choose an alternative to public schooling for their children would be meaningless. States would be free to impose so many requirements and restrictions on private schools that they would become indistinguishable from public schools. The rights guaranteed in *Pierce* would cease to exist.

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[33] Lampkin v. District of Columbia, 27 F.3d 605 (D.C. Cir. 1994).

[34] Palmer v. Bloomfield Hills Bd. of Educ., 417 N.W.2d 505 (Mich. Ct. App. 1987).

[35] Bartlett v. Board of Trustees of White Pine County Sch. Dist., 550 P.2d 416 (Nev. 1976).

[36] Hootch v. Alaska State-Operated Sch. Syst., 536 P.2d 793 (Alaska 1975); Deerfield Hutterian Ass'n v. Ipswich Bd. of Educ., 468 F. Supp. 1219 (D.S.D. 1979).

After World War I, a number of states passed laws designed to promote the goal of socializing or, as it was often called, "Americanizing," their heterogeneous populations. Some of these laws sought to foster majoritarian American beliefs and values and the use of the English language by regulating the curricula of private schools. In 1923, two years before *Pierce*, the Supreme Court considered a Nebraska law requiring that all instruction in private schools be in English and barring the teaching of any modern foreign language until after the eighth grade.

MEYER v. NEBRASKA

Supreme Court of the United States, 1923
262 U.S. 390

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School, he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of ten years, who had not attained and successfully passed the eighth grade. The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919, which follows:

> Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.
>
> Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.
>
> Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100) or be confined in the county jail for any period not exceeding thirty days for each offense.
>
> Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.

The Supreme Court of the State affirmed the judgment of conviction. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefor. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

> The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language.

The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. . . .

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the State has held that "the so-called ancient or dead languages" are not "within the spirit or the purpose of the act." Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. Those matters are not met within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams v. Tanner*, 244 U.S. 590 (1917), pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

[Holmes dissented, joined by Sutherland.]

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The *Meyer* Court recognized the right of the state to impose on private schools curriculum requirements designed to foster the physical, mental, moral, and civic development of their students. At the same time, it recognized the right of parents to have their children taught in accordance with the parents' desires and beliefs. A few years after *Meyer*, the Supreme Court in *Farrington v. Tokushige*[37] rejected a Hawaii law regulating private academies that children attended in addition to public school. The law prohibited attendance at these schools until after the second grade, limited attendance to six hours a week, and thoroughly regulated their curriculum.

Taken together, *Pierce*, *Meyer*, and *Tokushige* can be read as barring the states from prohibiting private school practices and curricula except, as the *Pierce* Court put it, those clearly "inimical to the public welfare." The power of the state to require private schools to teach certain subjects and even certain topics is generally accepted. However, states may not prohibit the inclusion of additional subjects even to ensure that more time will be available to devote to subjects legitimately required by the state.

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[37] 273 U.S. 284 (1927).

Today, most states prescribe a core curriculum including the three Rs and other subjects such as U.S. history that private schools are required to provide. Some states go further by insisting that private schools teach "patriotism" or "good citizenship." At least one state, Michigan, requires private schools to use textbooks that recognize the achievements and accomplishments of various ethnic and racial groups, and other states impose their own specific mandates.

However, no state currently prohibits private schools from teaching any particular subject or topic. Thus, the question of what teachings, if any, are sufficiently inimical to the public welfare to permit the state to prohibit their inclusion in private programs remains unanswered. Do private schools have a constitutional right to promote beliefs that government policy explicitly rejects? Do parents have a constitutional right to send their children to schools that advocate lawlessness? Given the great weight placed by modern courts on both parents' rights and freedom of speech, the answer to both these questions might well be that they do. Indeed, one Supreme Court opinion contains the dictum that ". . . parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and . . . children have an equal right to attend such institutions."[38]

Challenges to state regulation of private schools have been based on the Constitution's protection of parental rights, free speech, and, most frequently, freedom of religion. In a 1976 Ohio case, *State v. Whisner*,[39] a school affiliated with a fundamentalist Christian church objected to a set of regulations promulgated by the State Board of Education. Despite their title, "Minimum Standards for Ohio Public Schools," the regulations imposed strict standards on almost every facet of private school operation including, as the court noted, "the content of the curriculum . . . , the manner in which it is taught, the . . . persons who teach it, the physical layout of the building . . . , the hours of instruction, and the educational policies intended to be achieved . . ." Most onerous was the rule requiring that, "the total instructional time per week shall be: four-fifths—language arts, mathematics, social studies, health, citizenship, related directed study and self-help; optional foreign language (and) one-fifth—directed physical education, music, art, special activities and optional applied arts" because it in effect prohibited additional instruction in religion or other subjects not on the prescribed list.

In its analysis, the court noted that the regulations placed a heavy burden both on the free exercise rights of the students, parents, and teachers and also on the right of the parents "to direct the upbringing and education of their children in a manner . . . they deem advisable, indeed essential, and which (the court) cannot say is harmful." Such burdens could only be tolerated if the state could demonstrate a compelling need for the regulations, such as, for example, if the regulations were the only way to assure

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[38] Runyon v. McCrary, 427 U.S. 160 (1976).

[39] 351 N.E.2d 750 (Ohio 1976).

"a general education of high quality" for all students. Because the state could not do this, the regulations were declared unconstitutional.

Whisner shows that the Constitution does place limitations on the state's power to regulate the program of private religious schools. Regulations that are arbitrary or unnecessary to the achievement of the state's legitimate educational goals may not be enforced. However, the opinion should not be understood to prohibit all state regulations that a private school objects to on religious grounds. In fact, although the *Whisner* plaintiffs prevailed, most religion-based attacks on state regulation of private schools have been unsuccessful.

In a recent Ohio case, the Sixth Circuit rejected a parental claim that the state's mandatory program of proficiency testing in five subject areas—reading, writing, mathematics, science, and citizenship—impermissibly forced private schools to change their curricula and eradicated the distinction between public and private education.[40] Other courts have also upheld laws requiring standardized testing of private school students[41] as well as prior state review of private school programs,[42] local school board investigation of private schools,[43] and reporting of private school enrollment and attendance to the state.[44] If the "minimum standards" objected to in *Whisner* had merely required the teaching of specified subjects while permitting additional instruction in other subjects, they probably would have been sustained as well.

The *Pierce* opinion suggests that the state has the authority to insist that those who provide instruction in private schools be qualified teachers. Although most states place no specific requirements on private school teachers or require only that they be "qualified" or hold a bachelor's degree, a minority of states insist that private school teachers hold certification. This requirement has proved controversial especially with regard to religious schools.[45] In *Sheridan Road Baptist Church v. Department of Education*,[46] a church school objected on free exercise grounds to Michigan's requirement of certification for its teachers. In order to obtain certification the potential teachers had to obtain a bachelor's degree from an "approved" university in Michigan or elsewhere including specified amounts of credits in education, liberal arts, and the subjects they wished to teach. Although it agreed with the school that the requirement could potentially place a burden on its exercise of religion by limiting the pool of acceptable applicants, the court found that the state had a strong justification for its rule:

> The state's interest in education necessarily extends to an interest in teachers because a primary and vital ingredient to a good education is good teachers.

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[40] Ohio Ass'n of Indep. Sch. v. Goff, 92 F.3d 419 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 1107 (1997).

[41] Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988); Johnson v. Charles City Community Sch. Bd. of Educ., 368 N.W.2d 74 (Iowa 1985).

[42] Blount v. Department of Educ. & Cultural Serv., 551 A.2d 1377 (Me. 1988).

[43] New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940 (1st Cir. 1989).

[44] Fellowship Baptist Church v. Benton, 815 F.2d 486 (8th Cir. 1987); State v. De LaBruere, 577 A.2d 254 (Vt. 1990).

[45] *See*, State v. Melin, 428 N.W.2d 227 (N.D. 1988).

[46] 396 N.W.2d 373 (Mich. 1988).

> Therefore, to the extent that certification of teachers furthers education, it can be considered a compelling state interest. Those certification requirements which involve gaining expertise in a particular substantive field, taking classes in a program of general or liberal education, student teaching and taking a few basic courses in education are clearly aimed at and closely related to the goal of producing competent teachers.

In accordance with standard free exercise analysis, the outcome of the case depended on the relative weight given to the two competing interests:

> While complying with the certification requirements may mean that schools will have a smaller pool of applicants from which to select their teachers, there is no evidence that acceptable, certified people are not available. Parents have stated that they have no religious objection to having their children taught by certified teachers as long as they are also religiously acceptable to them. Religious school teachers may have to receive more training in order to become certified, but the regulations do not require anyone to attend courses taught from a perspective contrary to their beliefs. The teachers can fulfill all the state certification requirements while attending either a religious or nonreligious institution. For these reasons, we find the infringement on free exercise rights is minimal and is outweighed by the state's interest. . . .

Because the state's interest in assuring that all students be taught by qualified teachers outweighed the potential minor burden on the parents' religious freedom, the certification requirement was upheld.

FEDERAL REGULATION OF PRIVATE SCHOOLS

Because private schools are not government agencies, they are not generally bound by the limitations that the Constitution places on the government. Thus, for example, private schools are free to require their students to attend a particular church. Nevertheless, several federal statutes prohibit racial and other forms of discrimination in private school admissions and employment practices. A statute known as Section 1981[47] prohibits racial discrimination in the formation of contracts. In *Runyon v. McCrary*,[48] the Supreme Court ruled that Section 1981 prohibits private schools from denying admission on the basis of race.[49] Private schools that engage in racial discrimination in any of their policies or practices may also lose their tax exempt status even if the discrimination is based on religious belief.[50]

In addition, if a private school receives federal money, it is subject to Title VI of the Civil Rights Act of 1964 (see sec. 6.7), which prohibits discrimination on the basis of race by programs receiving federal financial assistance.[51] According to the broad definition of "program" adopted by

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[47] 42 U.S.C. §1994.

[48] 427 U.S. 160 (1976).

[49] *See also*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Brown v. Dade Christian Sch., Inc., 556 F.2d 310 (5th Cir. 1977).

[50] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[51] 42 U.S.C. §2000(d); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Flanagan v. President of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976).

Congress, a private school with a federally assisted lunch program would be required to comply with Title VI in all its endeavors, not just the lunch program.[52] Failure to do so could mean the loss of all federal funds. Similarly, private schools receiving federal money are prohibited from discriminating on the basis of gender by Title IX[53] (see sec. 6.7) except that church-sponsored schools are exempt from Title IX (but not Title VI) to the extent that the law conflicts with the tenets of the church.[54] Private schools that participate in the National School Lunch Program must comply with nondiscrimination requirements of the Department of Agriculture.[55] In some states, antidiscrimination statutes that apply to private schools may be more stringent than federal requirements.

Private schools receiving federal financial assistance are prohibited from discriminating against "otherwise qualified" disabled pupils by the Rehabilitation Act of 1973.[56] This means, for example, that they are bound by federal regulations concerning the discipline of disabled pupils. They "may not, on the basis of handicap, exclude a qualified handicapped person from the program if the person can, with minor adjustments, be provided an appropriate education . . ."[57] (see sec. 7.2). The "with minor adjustments" qualification means that unlike public schools, private schools may sometimes refuse to serve disabled pupils, but only if they are ill-equipped to provide them with an appropriate education and subject to the requirements of the Americans with Disabilities Act, if applicable.

The Americans with Disabilities Act[58] (ADA; see sec. 7.2) does not apply to religious schools, but it does apply to nonreligious private schools whether they receive federal assistance or not.[59] The ADA requires private schools to make "reasonable modifications" in their practices and policies, and provide "auxiliary aids and services," in order to accommodate the disabled, unless such modifications would "fundamentally alter" the nature of the services offered or result in an "undue burden." The law also requires schools to remove structural, architectural, and communication barriers in existing facilities and transportation barriers in existing vehicles if removal is "readily achievable."

Federal law, in some states supplemented by state statutes, also regulates the relationship between private schools and their employees. The laws already discussed regarding students apply to employment relationships as well. In addition, Title VII of the Civil Rights Act of 1964 forbids discrimination in private employment on the basis of gender, race, color, religion, or national origin[60] (see chap. 9).

Title VII's prohibition of discrimination based on religion does not, however, apply to religious schools. One section of the law specifically permits religious organizations, including religious schools, to employ only people of a particular religion.[61] A different section also permits hiring on the basis of religion by schools, colleges, and universities owned, supported, or controlled by a particular religion, or if the curriculum of the school is directed toward the "propagation" of a particular religion.[62] Based on these exceptions, one court permitted a Catholic school to dismiss a non-Catholic, previously divorced teacher because her marriage to a Catholic violated church doctrine.[63] However, Title VII's prohibitions of discrimination based on race, gender, and national origin do apply to religious schools[64] except to their hiring of ministers.[65]

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[52] 20 U.S.C.A. §1687.
[53] 20 U.S.C. §1681.
[54] 34 C.F.R. §106.12.
[55] 7 C.F.R. §15.1 et. seq.
[56] 29 U.S.C.A. §794.
[57] 34 C.F.R. §104.39; Hunt v. St. Peter Sch., 963 F. Supp. 843 (W.D. Mo. 1997).
[58] 42 U.S.C.A. §§12101-12213.
[59] Thomas v. Davidson Academy, 846 F. Supp. 611 (M.D. Tenn. 1994).
[60] 42 U.S.C. §2000(e).

In addition to Title VII, private schools may be subject to certain state civil rights and labor relations laws.[66] The National Labor Relations Act, however, does not apply to private schools.[67]

HOME SCHOOLING

With increasing frequency in recent years, parents have sought to instruct their children at home. Although many of the issues that arise regarding state regulation of home schooling parallel the private school issues discussed previously, some issues are unique to the regulation of home instruction.

Whereas education in private schools may not be prohibited, the Supreme Court has not addressed the question of the constitutionality of prohibiting home schooling. The consensus among the lower courts, however, is that home schooling may be prohibited. For example, in *State v. Eddington*, a New Mexico court allowed the state to ban home schooling to promote the goal of ensuring that children were brought into contact with people in addition to their parents so that they might be exposed "to at least one [additional] set of attitudes, values, morals, lifestyles and intellectual abilities."[68] Other courts have accepted the argument that the state may force children to attend school outside their home to foster the goal of socialization and the ability to relate to others.[69] Even parents claiming that their religious beliefs require teaching their children at home have usually lost in court.[70]

In a few cases, parents have succeeded in convincing a court that, under certain circumstances, home schooling is a constitutional right subject only to reasonable state regulation. In one such case, the court concluded that the Constitution prohibits state regulation of a proposed home school for any non-strictly-academic reason.[71] The opinion specifically barred rejection of a home school because it provided insufficient opportunity to socialize with other children.

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[61] 42 U.S.C. §2000e-1.

[62] 42 U.S.C. §2000e-2(e)(2).

[63] Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).

[64] Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975); EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982).

[65] EEOC v. Southwestern Baptist Theological Seminary 651 F.2d 277 (5th Cir. Unit A July 1981); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

[66] Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), *rev'd on other grounds*, 477 U.S. 619 (1986); Catholic High Sch. Ass'n of Archdiocese v. Culvert, 573 F. Supp. 1550 (S.D.N.Y. 1983), *rev'd*, 753 F.2d 1161 (2d Cir. 1985).

[67] N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

[68] 663 P.2d 374 (N.M. Ct. App. 1983).

[69] Stephens v. Bongart, 189 A. 131 (N.J. Super. Ct. 1937).

[70] Burrow v. State, 669 S.W.2d 441 (Ark. 1984).

Regardless of whether home schooling constitutionally may or may not be abolished, most states have chosen to permit it. Whereas prior to 1980 most states' laws either prohibited home schooling or were silent on the question, today only a few continue to maintain an outright ban. Even in states where home schooling remains illegal, it is often tacitly tolerated. Despite its victory in the *Eddington* case, New Mexico now permits home schooling.

Almost all states that allow home instruction impose restrictions and regulations on it, although the enforcement of these regulations varies greatly. In some cases, home-school regulations differ from and are more extensive than those enforced against private schools. For example, home instructors may be required to hold teaching certification but private school instructors not. Courts have generally rejected constitutionally-based objections to states treating home schools differently from private schools. The differential treatment is allowed because: assessing the quality of home instruction is deemed more difficult than assessing the quality of private schools, home instructors do not have supervisors, and home schools have no competition to "keep them honest."[72]

In many states, public school administrators are charged with enforcing some or all of the statutory restrictions on home schooling.[73] In some states the burden of proof is on home instructors to show that they are meeting the requirements of state law, but in others the state bears the burden of showing that a home school is not adequate under the law.[74]

There are four general categories of home school regulations:

1. Instructor qualification requirements. Some states have a general requirement that home schooling parents be qualified to teach. A few states require home teachers to have a bachelor's degree or state teaching certification. The North Dakota Supreme Court rejected the claim that a parent's right to free exercise of religion was violated by a teacher certification requirement for home schools.[75]

2. Pupil assessment requirements. Over half the states require that pupils instructed at home be tested or otherwise assessed for academic progress. A federal district court in West Virginia rejected an equal protection challenge brought against a statute that prohibited the home education of children whose standardized test scores fell below the fortieth percentile and who did not improve those scores after remedial home schooling.

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[71] Perchemlides v. Frizzle, Case No. 16641 (Sup. Ct. of Hampshire County, Mass. 1978).

[72] Blount v. Department of Educ. & Cultural Serv., 551 A.2d 1377 (Me. 1988); Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); People v. Turner, 263 P.2d 685 (Cal. Super. 1953), *appeal dismissed*, 347 U.S. 972 (1954).

[73] Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988), *aff'd*, 866 F.2d 548 (2d Cir. 1989).

[74] State v. Moorhead, 308 N.W.2d 60 (Iowa 1981); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974); State v. Vaughn, 207 A.2d 537 (N.J. 1965); State v. Cheney, 305 S.W.2d 892 (Mo. Ct. App. 1957).

[75] State v. Patzer, 382 N.W.2d 631 (N.D. 1986).

3. Visitation requirements. Some states require that home schools permit state education officials to observe their program and examine work produced by the pupil. A federal district court rejected a free-exercise-based challenge to a Maryland law that required parents to keep a portfolio of instructional materials and to permit home visits by school officials to observe the teaching and review the portfolio.[76] Another federal district court rejected the claim that required home visits violated parental rights of privacy as protected by the Fourth Amendment's prohibition against unreasonable searches.[77]

4. Programmatic requirements. State law may require that children taught at home receive instruction that is equivalent, substantially equivalent, or comparable to that offered in the public schools. These requirements usually have been upheld against challenges that they are unconstitutionally vague.[78]

Determining whether a home school satisfies an "equivalency" requirement can be a tricky proposition. In a New Jersey case, the state objected to a home school taught by a high school graduate.[79] The parent presented an elaborate, educationally sound instructional plan as well as evidence that the home-taught child was making excellent academic progress. The state's primary objection to the home school was that it did not provide equivalent opportunities for "social development," an argument that had been accepted by some previous courts.[80] However, the court rejected this argument primarily because the state's compulsory education law contained the words, "or to receive equivalent instruction elsewhere than at school." When the legislature wrote these words, reasoned the court, it must have contemplated the possibility that a home school could be equivalent even in the absence of opportunities to socialize with other pupils. Under a very different set of circumstances, an Iowa court ruled that a certified teacher's insistence on teaching her "moderately mentally retarded" son at home, where he was making little progress, constituted "neglect" under state statute. The court ordered the parents to send the child to school or else risk having the child removed from the home.[81]

PRIVATE AND HOME-SCHOOLED PUPILS' PARTICIPATION IN PUBLIC SCHOOL PROGRAMS

Parents of private and home-schooled pupils sometimes wish to have their children participate in some public school courses or extracurricular activities. Statutes in a small number of states such as Idaho permit nonpublic school students and home-schooled students to enroll in any public school course, participate in extracurricular activities, and use school facilities.[82] A Michigan law permits students who attend nonpublic schools, including home schools, to enroll in non-core courses in public schools.[83]

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[76] Battles v. Anne Arundel County Bd. of Educ., 904 F. Supp. 471 (D. Md. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996).

[77] Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y.), *aff'd*, 866 F.2d 548 (2d Cir. 1988).

[78] Mazanec v. North Judson-San Pierre Sch. Corp., 763 F.2d 845 (7th Cir. 1985); Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988), *aff'd*, 866 F.2d 548 (2d Cir. 1989); Bangor Baptist Church v. Maine Dep't of Educ. & Cultural Serv., 549 F. Supp. 1208 (D. Me. 1982); *but see*, State v. Newstrom, 371 N.W.2d 525 (Minn. 1985).

[79] State v. Massa, 231 A.2d 252 (N.J. 1967).

[80] Knox v. O'Brien, 72 A.2d 389 (N.J. 1950).

[81] In the Interest of B.B., 440 N.W.2d 594 (Iowa 1989).

In the absence of such a statute, parents have no legal right to insist that their children be allowed to participate in public school programs in which they are not enrolled or to partially enroll in order to participate in selected courses or activities. In a Maryland case, the court rejected a claim by the parents of a private school pupil that the constitutional guarantees of equal protection and religious freedom required the public school to allow their child to participate in extracurricular activities.[84] Some school boards may adopt a policy of allowing private or home-schooled students to enroll part-time for particular courses or activities, but the district will usually not receive state aid for such pupils. In most states, the rules concerning varsity sports and other competitive interscholastic activities preclude participation by non-full-time students. In a New York case, the court ruled that a home-schooled student's right to equal protection under the Fourteenth Amendment was not violated when his school district denied him the opportunity to participate in the district's sports program.[85]

2.5 GOVERNMENT ASSISTANCE TO PRIVATE SCHOOLS

Despite the legal disputes examined in the last section, the states are not always hostile to private schools. In fact, many states wish to encourage private school attendance for political, philosophical, or educational reasons or as a way to save money. However, aid to private schools is legally controversial because most private schools are associated with a church, teach religious doctrines, and encourage religious belief. The basic question examined in this section is whether various forms of state aid to private religious schools and their students violate the Establishment Clause of the First Amendment.

In the early days of the United States, government aid to private schools was quite common and served as a practical way to foster an educated citizenry. State support of private religious schools was not seen as a violation of the U.S. Constitution because the First Amendment provides only that "Congress," that is, the federal government, "shall make no law respecting an establishment of religion." Not until 1925 did the Supreme Court interpret the Fourteenth Amendment, adopted in 1868, as placing some of the same restrictions on state government action that the Bill of

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[82] Idaho Code §§33-203.

[83] Snyder v. Charlotte Pub. Sch. Dist., 365 N.W.2d 151 (Mich. 1984).

[84] Thomas v. Allegany County Bd. of Educ., 443 A.2d 622 (Md. Ct. Spec. App. 1982).

[85] Bradstreet v. Sobol, 630 N.Y.S.2d 486 (Sup. Ct. 1995), *aff'd*, 650 N.Y.S.2d 402 (App. Div. 1996).

Rights imposes on Congress.[86] Not until 1940 was the Establishment Clause applied to the states.[87]

Nevertheless, by the late nineteenth century, state aid to religious schools was controversial. Some states continued to assist private schools by offering free transportation or textbooks to their pupils, but others rejected these measures and even passed laws designed to discourage private school attendance. A proposed federal constitutional amendment prohibiting the use of any state tax money to aid parochial schools was considered in 1876 but ultimately failed.

In many states, the most valuable and politically and legally contentious form of state aid to parochial schools was the exemption of property used for religious or educational purposes from property tax. By 1918, fourteen state constitutions required the legislature to grant property tax exemptions and nineteen others authorized them. In many of the latter group of states, exemptions were repeatedly granted and rescinded. In 1970, the Supreme Court in *Walz v. Tax Commission*[88] upheld a New York law granting property tax exemptions to private religious, educational, and charitable institutions.

Beginning in 1947, the Supreme Court has considered a long series of Establishment-Clause-based challenges to a variety of more direct forms of aid to parochial schools and their pupils. In *Everson v. Board of Education*[89] the Court considered the constitutionality of a state plan providing free transportation to private school pupils. In deciding the case, the Court for the first time employed Thomas Jefferson's metaphor that the First Amendment erected "a wall of separation between church and state." This meant, said the Court, that the government could not pass laws that aided one religion, aided all religions, or preferred one religion over another. In this case, however, the Court concluded that the program under attack did not in fact support private religious schools. The aid in question was but "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." The Court did warn, however, that the program approached the "verge" of the state's power.

A year later in *McCollum v. Board of Education*,[90] the Court did find unconstitutional a program that enabled the interfaith Champaign (Illinois) Council on Religious Education to offer classes in religious instruction to public school children on public school premises. The classes were taught by members of the clergy at no expense to the schools and were attended for thirty to forty-five minutes a week by pupils whose parents signed written authorizations. Students who did not attend were required to pursue their secular studies elsewhere in the building. Attendance at both the secular and religious classes was strictly enforced. Relying on the "no aid" principle of *Everson*, the Court found that this arrangement provided "sectarian groups an invaluable aid."

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[86] Gitlow v. New York, 268 U.S. 652 (1925).

[87] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[88] 397 U.S. 644 (1970).

[89] 330 U.S. 1 (1947).

[90] 333 U.S. 203 (1948).

In the next major related case, *Zorach v. Clauson*,[91] the Court found no constitutional violation in a plan that allowed public school students with parental permission to leave the school during regular school hours to go to private religious centers where they were instructed in religion and where attendance was taken on behalf of the public school. To reach this conclusion, the Court abandoned the strict separation doctrine used in *Everson* and *McCollum*. The First Amendment, said the Court, did not require "that in every and all respects there shall be a separation of Church and State." What was prohibited was "concert, or union or dependency one on the other." The release time arrangement was merely the accommodation of the public school schedule to a program of outside religious instruction.

Then, in 1968, in *Board of Education v. Allen*,[92] the Court upheld a program of loaning secular textbooks to students attending private religious schools. In deciding this case, the Court invoked yet another standard for analyzing challenges to programs of state aid to parochial schools. Its conclusion was based on the finding that the program had neither the purpose nor the primary effect of aiding religion.

In 1971, in considering a program of state subsidies for parochial school teachers, the Court in *Lemon v. Kurtzman*[93] for the first time employed the framework for analyzing alleged violations of the Establishment Clause that has become the standard ever since. Combining elements of the doctrines used in *Zorach* and *Allen*, the three-part *Lemon* test holds that a government policy or practice violates the Establishment Clause if (a) its purpose is to endorse or disapprove of religion, (b) its primary effect is to aid or inhibit religion, or (c) it either creates excessive administrative entanglement between church and state or is conducive to religiously based political divisiveness. (Chapter 3 further explains the use of the *Lemon* test as it applies to the programs and practices of public schools.)

The application of the *Lemon* test to programs of government aid to parochial schools has resulted in a patchwork of inconsistent decisions. The following forms of aid have been judged permissible:

- Supply of state-prepared standardized tests and scoring services[94]
- Provision of speech, hearing, and psychological services whether offered at the parochial school or a neutral place[95]
- Provision of diagnostic speech, hearing, and psychological services provided at the parochial school[96]
- Cash reimbursement for costs associated with state-mandated testing and reporting requirements in connection with tests prepared by the state, but scored by parochial school personnel[97]

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[91] 343 U.S. 306 (1952).
[92] 392 U.S. 236 (1968).
[93] 403 U.S. 602 (1971).
[94] Wolman v. Walter, 433 U.S. 229 (1977).
[95] Wolman v. Walter, 433 U.S. 229 (1977).
[96] Wolman v. Walter, 433 U.S. 229 (1977).
[97] Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

- State income tax deductions, available to both public and private school parents for expenses incurred for tuition, textbooks, and transportation to school[98]
- Federal grants for care and prevention services regarding teenage pregnancy provided by religious and nonreligious organizations[99]

However, the Supreme Court has found the following parochial school assistance programs unconstitutional:

- Subsidizing teacher salaries[100]
- Subsidizing secular courses[101]
- Loan of instructional materials and equipment other than textbooks such as maps and audiovisual equipment[102]
- Subsidizing transportation for field trips[103]
- Grants for maintenance of school facilities[104]
- Per pupil allotment of funds to maintain enrollment and other records[105]
- Provision of remedial and accelerated instructional services, guidance, counseling, testing, and speech and hearing services on the premises of a parochial school[106]
- Provision of remedial and enrichment courses on parochial school grounds during the school day[107]
- Provision of federally funded programs for the educationally disadvantaged on parochial school grounds[108] (but see *Agostini* case, p. 48)
- Provision of community education programs on parochial school grounds during nonschool hours[109]
- Partial tuition reimbursement available only to parents sending children to private schools[110]
- Tax deductions for tuition expenses available only to parents sending children to private schools[111]

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[98] Mueller v. Allen, 463 U.S. 388 (1983).
[99] Bowen v. Kendrick, 487 U.S. 589 (1988).
[100] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[101] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[102] Wolman v. Walter, 433 U.S. 229 (1977).
[103] Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985).
[104] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
[105] Wolman v. Walter, 433 U. S. 229 (1977).
[106] Meek v. Pittenger, 421 U.S. 349 (1975).
[107] Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985).
[108] Aguilar v. Felton, 473 U.S. 402 (1985).
[109] Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985).
[110] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
[111] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

In 1985, in *Aguilar v. Felton*,[112] the Supreme Court considered the issue of whether it was permissible under the Establishment Clause for a public school district to provide Title I services in parochial schools. The district used federal funds to send teachers to religious schools to provide federally-mandated, supplementary remedial education to qualifying students. Steps were taken to ensure that the publicly paid teachers would not be involved in religious activities and that the classrooms in which they worked would be free of religious adornment. Nevertheless, the Court, relying primarily on the entanglement prong of the Establishment Clause, found the program impermissible. The Court found that the teachers' work within the school as well as the monitoring of the program by public supervisory personnel created, "a permanent and pervasive state presence in the schools receiving aid" that "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement."

Twelve years later, in the wake of a great deal of expenditure of public funds to transport parochial school students off campus to receive Title I services and significant public and government sentiment against the *Aguilar* decision, the Supreme Court reconsidered the issue. This time, in *Agostini v. Felton*, the Court came to the opposite conclusion.

AGOSTINI v. FELTON

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521 U.S. 203

Justice O'CONNOR delivered the opinion of the Court.

In *Aguilar v. Felton* (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners—the parties bound by that injunction—seek relief from its operation. Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are entitled to relief from the operation of the District Court's prospective injunction.

I.

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act to "provid[e] full educational opportunity to every child regardless of economic background." Toward that end, Title I channels federal funds, through the States, to "local educational agencies" (LEA's). The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. (LEA's must use funds to "help participating children meet . . . State student performance standards," LEA's may use funds to provide "counseling, mentoring, and other pupil services"). An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area and (ii) who is failing; or is at risk of failing, the State's student performance standards. Title I funds must be made available to *all* eligible children, regardless of whether they attend public schools, and the services provided to children attending private schools must be "equitable in comparison to services and other benefits for public school children."

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[112] 473 U.S. 402 (1985).

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "schoolwide" basis. In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. The Title I services themselves must be "secular, neutral, and nonideological" and must "supplement, and in no case supplant, the level of services" already provided by the private school. . . .

Approximately 10% of the total number of students eligible for Title I services are private school students. Recognizing that more than 90% of the private schools within the Board's jurisdiction are sectarian, the Board initially arranged to transport children to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were concerned for the safety of their children. The Board then moved the after-school instruction onto private school campuses, as Congress had contemplated when it enacted Title I. After this program also yielded mixed results, the Board implemented the plan we evaluated in *Aguilar v. Felton*.

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. As the Court of Appeals in *Aguilar* observed, a large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school.

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team-teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. All religious symbols were to be removed from classrooms used for Title I services. The rules acknowledged that it might be necessary for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month.

In 1978, six federal taxpayers—respondents here—sued the Board in the District Court for the Eastern District of New York. Respondents sought declaratory and injunctive relief, claiming that the Board's Title I program violated the Establishment Clause. The District Court granted summary judgment for the Board, but the Court of Appeals for the Second Circuit reversed. . . . In a 5–4 decision, this Court affirmed on the ground that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." . . .

The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered computer-aided instruction, which could be provided "on premises" because it did not require public employees to be physically present on the premises of a religious school.

It is not disputed that the additional costs of complying with *Aguilar*'s mandate are significant. Since the 1986–1987 school year, the Board has spent over

$100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites. . . . These "*Aguilar* costs" thus reduce the amount of Title I money an LEA has available for remedial education, and LEA's have had to cut back on the number of students who receive Title I benefits . . .

In October and December of 1995, petitioners—the Board and a new group of parents of parochial school students entitled to Title I services—filed motions in the District Court seeking relief . . . from the permanent injunction entered by the District Court on remand from our decision in *Aguilar*. Petitioners argued that relief was proper . . . because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." . . . We granted certiorari, and now reverse. . . .

III.

A.

In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar*, as well as its companion case, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 873 (1985), rested.

In *Ball*, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of the nonpublic schools. Of the 41 nonpublic schools eligible for the program, 40 were "pervasively sectarian" in character—that is, "the purpos[e] of [those] schools [was] to advance their particular religions." . . .

The Court conducted its analysis by applying the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

The New York City Title I program challenged in *Aguilar* closely resembled the Shared Time program struck down in *Ball*, but the Court found fault with an aspect of the Title I program not present in *Ball*: The Board had "adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools." Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded that the level of monitoring necessary to be "certain" that the program had an exclusively secular effect would "inevitably resul[t] in the excessive entanglement of church and state," thereby running afoul of *Lemon*'s third prong. . . .

Distilled to essentials, the Court's conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. . . .

B.

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. . . . Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect. . . .

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), we examined whether the [Individuals with Disabilities Education Act (IDEA)] was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that "the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school." "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "add[ing] to [or] subtracting from" the lectures translated. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that "the provision of such assistance [was] not barred by the Establishment Clause." *Zobrest* therefore expressly rejected the notion—relied on in *Ball* and *Aguilar*—that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. *Zobrest* also implicitly repudiated another assumption on which *Ball* and *Aguilar* turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion. . . .

The signer in *Zobrest* had the same opportunity to inculcate religion in the performance of her duties as do Title I employees, and there is no genuine basis upon which to confine *Zobrest*'s underlying rationale—that public employees will not be presumed to inculcate religion—to sign-language interpreters. . . .

Second, we have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid. In *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1985), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'" The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals. The same logic applied in *Zobrest*, where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could] not be attributed to *state* decisionmaking." Because the private school would not have provided an interpreter on its own, we also concluded that the aid in *Zobrest* did not indirectly finance religious education by "reliev[ing] the sectarian schoo[l] of costs [it] otherwise would have borne in educating [its] students."

Zobrest and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. . . .

As discussed above, *Zobrest* also repudiates *Ball's* assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. . . . [The lower courts have uniformly adopted the notion] that Title I services may be provided to sectarian school students in off-campus locations, even though that notion necessarily presupposes that the danger of "symbolic union" evaporates once the services are provided off-campus. Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither "sensible" nor "sound" and the Court in *Zobrest* rejected it. . . .

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in *Zobrest*, Title I services are by law supplemental to the regular curricula. These services do not, therefore, "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." . . .

[W]e fail to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application. . . .

We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided in New York City's sectarian schools. . . . We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. . . .

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off-campus, and *Aguilar* implied that providing the services off-campus is entirely consistent with the Establishment Clause. . . .

[A] sectarian school would . . . have the same incentive to "make patently significant cut-backs" in its curriculum no matter where Title I services are offered, since the school would ostensibly be excused from having to provide the Title I-type services itself. Because the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus. Accordingly, contrary to our conclusion in *Aguilar*, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination. . . .

A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. . . . This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion. . . .

Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school. The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

We turn now to *Aguilar*'s conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, and as a factor separate and apart from "effect." Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (*e.g.*, whether the religious institutions were "predominantly religious") and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological). Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion. . . . Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect. . . .

The pre-*Aguilar* Title I program does not result in an "excessive" entanglement that advances or inhibits religion. As discussed previously, the Court's finding of "excessive" entanglement in *Aguilar* rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus. Further, the assumption underlying the first consideration has been undermined. In *Aguilar*, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk *pervasive* monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. . . .

For these reasons, we reverse the judgment of the Court of Appeals and remand to the District Court with instructions to vacate its September 26, 1985, order.

That the Supreme Court overruled one of its own fairly recent decisions is somewhat unusual, yet *Agostini* is consistent with the Court's approach to most Establishment Clause cases over the past two decades. This approach, referred to as the "neutrality doctrine," has refined but not replaced the Court's use of the *Lemon* test. The neutrality doctrine holds that it is permissible for a church or other religious organization such as a parochial school to receive assistance from a government program as long as the program is religiously neutral. This means that beneficiaries of the program must not be defined according to religion, but rather that the assistance must be available to all or on the basis of nonreligious criteria. Most often this requirement will be satisfied if individuals receive benefits that they may, at their discretion, transfer to either religious or secular organizations. Thus, in recent years, the Court has:

- authorized payment of public funds to a visually impaired person for vocational services even when the recipient used the funds to pay his tuition at a Christian college to prepare himself for a career as a pastor, missionary, or youth director[113]
- upheld a system of federal grants for public and nonpublic organizations, including religious organizations, for counseling services and research concerning premarital adolescent sexual relations and pregnancy[114]
- held that although a school district may limit the use of its property to school activities, once a district makes its facilities available for after-hour use for social, civic, and recreational purposes, it may not deny the use of those facilities to a religious group solely because of the religious message of the group[115]
- concluded that the provision of a publicly funded sign-language interpreter pursuant to the Individual with Disabilities Education Act to a deaf student attending a religious school did not violate the Establishment Clause[116]
- prohibited New York state from redrawing school district boundaries in order to create a religiously homogeneous school district.[117]

The neutrality doctrine case with the most far-reaching implications for public funding of private schools and for educational policy generally was actually decided two years before *Aguilar*. In 1983, in *Mueller v. Allen*,[118] the Supreme Court upheld a Minnesota law that allowed taxpayers to deduct from their state income taxes certain expenses incurred in providing education for their children including tuition expenses at parochial schools. To decide the case, the Court applied the three prongs of the *Lemon* test: purpose, primary effect, and entanglement. On the issue of whether the law had a secular purpose, the Court wrote:

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[113] Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986).
[114] Bowen v. Kendrick, 487 U.S. 589 (1988).
[115] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
[116] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).
[117] Board of Educ. of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994).
[118] 463 U.S. 388 (1983).

> A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's effort to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian.

In finding that Minnesota's educational tax-credit law did not have the primary effect of advancing religion, the Court noted that the tax deductions were available to all parents including those whose children attended public schools and nonsectarian private schools. The Court did acknowledge that the financial aid provided to parents had an economic effect comparable to that of aid given directly to parochial schools. But Establishment Clause concerns were reduced because the aid was channeled through the parents, so there was no state imprimatur conferred on the religious schools. The historic purposes of the Establishment Clause, said the Court, were to avoid significant religious or denominational control of our democratic processes and deep division along religious lines. "The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."

As for the claim of the plaintiffs that the law had the primary effect of benefiting religion because ninety-six percent of the children attending private schools attended religious schools, the Court wrote, "We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

Regarding the third prong of the *Lemon* test, the Court concluded that the tax-credit program did not foster excessive entanglement between church and state. That the state might have to disallow deductions for textbooks used in teaching religion was no more a problem than having to screen the books eligible for textbook loan programs. Finally, the Court suggested that religiously-based political divisiveness was only an issue when direct financial subsidies are paid to parochial schools but, again, not when they are channeled through individual citizens.

EDUCATIONAL VOUCHERS AND THE ESTABLISHMENT CLAUSE

A much discussed proposal for educational reform is to institute a family-choice or voucher plan that would allow parents to send their children to the public or private school of their choice at state expense. One of the issues surrounding this proposal is the question of whether the Establishment Clause would permit the state to pay tuition at religious schools.

Mueller v. Allen and the general acceptance by the Supreme Court of the neutrality doctrine in recent Establishment Clause cases indicate that a properly crafted voucher program that made funds available for use in either religious or nonreligious schools at the discretion of individual parents would pass federal constitutional muster. At least three additional cases further support the contention that publicly funded tuition payments to religious schools would not necessarily violate the Establishment Clause. In 1994, the Supreme Court of Vermont relied on *Mueller* and related U.S. Supreme Court precedents to permit the use of state money to reimburse a parent for the tuition he paid to send his son to a parochial high school. The family resided in an area that had no public high school, and the parents were permitted to send their children to any state-approved private school, religious or not.[119] Also relying on Supreme Court precedent, a federal district court in Minnesota in 1990 upheld a policy that allowed students to obtain public high school credit by taking courses at eligible institutions of higher education including religiously affiliated colleges.[120] Most recently, in 1998, the Wisconsin Supreme Court ruled that the Milwaukee Parent Choice Program, a state program of paying tuition for up to fifteen percent of Milwaukee's pupils to attend private religious or nonreligious schools at their parents' option, did not violate the Establishment Clause.[121] Despite these cases, voucher plans that require elaborate and continuous state monitoring of participating religious schools might run afoul of the entanglement prong.

Even if voucher plans are permissible under the Establishment Clause, some state constitutions may prohibit them. Several state courts have ruled that their state constitutions prohibited state payment of tuition at religious schools.[122] However, in the 1998 Wisconsin case mentioned previously, the Wisconsin Supreme Court ruled that state payment of religious school tuition under the Milwaukee Parent Choice Program did not violate the state constitutional provision banning use of state money "for the benefit of religious societies, or religious or theological seminaries." After examining the constitutions and case law of all fifty states, one legal scholar concluded that there are fourteen states whose state constitutions would probably permit state payments to religious schools through a voucher plan, seventeen states whose constitutions would probably prohibit such a plan, and nineteen in which the state courts might rule either way.[123]

2.6 SUMMARY

The statutes of all fifty states require children to go to school and parents to send their children to school. Compulsory education laws are justified by society's need for an educated citizenry. Although it is possible in all states to fulfill the obligations of the compulsory education law by attending public school, it is not required. Parents have a constitutional right to control the upbringing and education of their children by sending them to private school.

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[119] Campell v. Manchester Bd. of Sch. Dir., 641 A.2d 352 (Vt. 1994).

[120] Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694 (D. Minn. 1990).

[121] Jackson v. Benson, 578 N.W.2d 606 (Wis. 1998).

[122] Weiss v. Bruno, 509 P.2d 973 (1973), *modified*, 523 P.2d 915 (Wash. 1974); Opinion of the Justices (Choice of Education), 616 A.2d 478 (N.H. 1992).

[123] Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 Ed. L. Rep. 1 (1997).

The Constitution requires excusing Amish children from attending school after the eighth grade. In some states, there are also a few narrow statutory exemptions from the requirements of compulsory education. Some states excuse employed children of specified age, minors with children, or those living great distances from the nearest school. Certain categories of disabled children are also exempt from the compulsory schooling law in some states, but other federal and state laws require that all disabled children receive an education. A few state courts have excused children whose schools were found unsafe.

State law may impose requirements for admission to public school. Minimum and maximum age requirements, health-related requirements such as mandated medical examinations and immunizations, and residency requirements have all survived constitutional challenge. However, a number of states are moving away from limiting public school attendance to the district of residence. Similarly, although most states permit school districts to assign pupils to any school or program within the district, the trend in some places is to permit parents to choose any school they wish.

Although private school attendance is a constitutional right, the state retains the power to regulate private education in order to ensure meeting the goals of compulsory schooling. The state may require the teaching of particular subjects or topics but may not usually forbid the offering of additional curricula. States may also regulate the minimum duration of the private school day and year, require reporting of enrollment and achievement data, impose standardized testing requirements, and set qualifications for private school teachers. The state may not, however, impose unreasonable regulations designed to make private schools indistinguishable from public. Federal law prohibits racial discrimination in private school admissions and employment practices. Federal laws prohibiting discrimination based on gender and disability apply in some private school situations but not others.

Unlike private school, there is no constitutional right to home schooling according to most courts that have considered the issue. However, in recent years, almost all states have chosen to permit home schooling. Most states impose fairly extensive requirements designed to ensure that home-schooled children receive an adequate education. These requirements are usually similar and, in some cases, more extensive than the regulations that apply to private schools.

Some states have chosen to offer aid to private schools and their students. Any program that provides public money to parochial schools is almost sure to be challenged as a violation of the Establishment Clause. The Supreme Court has forbidden many forms of direct or indirect assistance to private religious schools; however, the provision of transportation to and from school, the loan of secular textbooks, assistance with the costs of state-mandated testing, the provision within religious school buildings by publicly paid teachers of legally mandated services to disadvantaged and disabled students, tax breaks available equally to public and private school parents, and property tax exemptions for parochial schools themselves are constitutionally permissible. The recent trend in Supreme Court decisions suggests that the Court will uphold governmental programs that benefit private schools as part of a general program whose beneficiaries are not defined by religion. This trend probably means that some voucher programs are permissible under the Establishment Clause, but some state constitutions may prohibit voucher plans that include parochial schools.

CHAPTER 3

CURRICULUM

Chapter 2 examined the state's authority to regulate private schools. This chapter considers the limits on the state's power to control the educational program of its own public schools.

The public school curriculum is society's primary method of attempting to structure its future. Because of the perceived potential of schools to promote cultural, political, ideological, and even religious attitudes and behaviors, debate over curriculum is pervasive, ongoing, and acrimonious. To control curriculum is to decide how the young are to be instructed, what we would have them know and value, and ultimately, what we would have them believe.

As U.S. society becomes ever more pluralistic, pressures mount to ensure that the public school provides its diverse population with a common educational experience. Equally strong are demands that schools respect and even promote the various cultures into which the school population was born. In short, society is faced with many questions: Will the public school be a smorgasbord or a melting pot? Will public schools offer an array of culturally, politically, ideologically, educationally, and linguistically diverse experiences from which parents or students may choose? Will there be separate schools and programs for, among others, Black males, Spanish-speaking children, fundamentalist Christians, and those who want to study the arts? Or will the schools provide all students with a common experience? If a common experience is provided, will it be multicultural or focused only on the dominant culture? Whichever option is chosen, how and by whom will the curriculum be developed? Will its ultimate goal be to promote diversity or to create a uniform U.S. culture and creed?

This chapter explores these questions and the legal problems they create. It begins by discussing the shared legal authority for the creation and control of the school program. Then the chapter considers a variety of legal challenges to the power of the state and local school boards to set curriculum, select materials, and structure the activities of public schools. Most of these challenges are based on the religion or speech clauses of the First Amendment or other constitutional provisions.

3.1 CONTROL OF THE PUBLIC SCHOOL PROGRAM: AN OVERVIEW

Although some state constitutions contain brief references to subjects that must be taught, the primary legal authority for specifying the curriculum of the public schools rests with the state legislatures. (In a few states, by constitutional provision, this power is shared between the state legislature and the state board of education.) The state legislature may, if it wishes, prescribe the basic course of study down to the last detail, select all books and materials, determine graduation requirements, prescribe standardized testing requirements, and even establish the methods of instruction.

In practice no legislature has gone this far. All of them, to varying degrees, voluntarily share control of the curriculum with their state boards of education and, most important, with local school districts. Within the limits set by the legislature, many of the details of a school's curriculum are set by the local school board. In some places, legal authority over the public school program has in recent years been shifted to individual schools either by creating school-based management councils or through a system of charter schools. In Kentucky, school-site councils now enjoy a range of powers that include control of the curriculum, instructional practices, textbooks, and instructional materials.[1] The Chicago School Reform Act created Local School Councils that have the power to appoint the principal, approve school improvement plans, and make recommendations regarding textbooks and other curricular matters.[2]

Charter schools are new legal entities created by the legislatures of more than half the states. In some states, they are state-approved, not-for-profit, nonreligious private schools that control their own programs and receive state funding for each pupil they attract. Some states also permit existing public schools to apply to become charter schools at the initiation of local parents and teachers. Charter schools are released from many of the requirements of their state and local school board, thereby freeing them to develop their own policies and programs. For example, Connecticut permits up to one-half of the teachers in charter schools to be noncertified.[3] However there are other regulations with which charter schools must comply, such as antidiscrimination requirements, labor laws, reporting, and even open meeting law requirements.[4]

At the other end of the educational governance spectrum lies the federal government, which, despite the Tenth Amendment, also plays an important part in shaping the school program. The primary mechanisms of federal control are categorical aid, money provided with programmatic requirements attached, and antidiscrimination statutes that regulate the education provided to minority groups and special populations (see chap. 6 and 7). Finally, the judiciary, primarily through its constitutional interpretations, also has a significant effect on the program of public schools.

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[1] Ken. Rev. Stat. §§160.345(2)(i)I, §160.345(2)(i)(6), §160.345(2)(g).

[2] Ill. Comp. Stat. Ann. §§5/34-2.1 et. seq.

[3] Conn. Gen. Stat. §10-66dd.

[4] *See, e.g.*, Mich. Comp. Laws Ann. §380.501 et. seq.

Outside the formal governance process of education, many extra-legal influences affect the curriculum, such as textbook manufacturers, teacher unions and professional associations, parents, and a variety of special interest groups. Teachers and school administrators also may have a great deal of control over the programs of their own classrooms and schools. This control may be viewed as delegated either explicitly by the school board or implicitly by the failure of state and local authorities to act. This chapter focuses on the legal authority to control the curriculum rather than on the political and educational mechanisms of curriculum development.

ESTABLISHING MINIMUM STANDARDS

Setting minimum standards regarding the education all public school students must receive is a task shared by multiple levels of government. State law and policy require certain courses and topics for all students and establish minimum coursework and achievement requirements. Local school districts may then establish their own additional minimum standards as long as they do not contradict state requirements. Federal statutes and aid programs specify additional minimum standards, most notably regarding the education of the disabled and other special populations (see chap. 7). The Supreme Court has suggested, but not officially ruled, that the provision of a minimally adequate education to some students but not others violates the Equal Protection Clause of the Fourteenth Amendment.[5] A number of the highest state courts have declared a state constitutional duty to provide all students with a minimally adequate education (see chap. 8).

CREATING PRIORITIES

Some priorities and goals for local schools are created or at least influenced by state graduation, promotion, and testing requirements. Federal aid programs also may have significant effects on the educational priorities of local school districts. Within these constraints, most goal setting occurs under the auspices of local school boards.

LIMITING LOCAL OPTIONS

In many states, statutes specifically prohibit certain subjects or topics, such as curricula designed to promote belief in communism. In some states, statutes allow parents and even students themselves to force a local school to offer courses or programs that are not otherwise required by the state. Where statewide textbook adoption exists, such as in California and Texas, state officials have an additional way to limit what may be taught. Federal and state court rulings also restrict school programs, particularly in the area of religious instruction. Additionally, the judiciary has placed some limits on state and school board authority to exclude or remove courses and books from the curriculum.

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[5] Plyler v. Doe, 457 U.S. 202 (1982).

ESTABLISHING GRADUATION REQUIREMENTS

State statutes and regulations typically establish minimum course or credit requirements for graduation. Again, local school districts are free to impose more stringent requirements. Some states also require students to pass a minimum competency exam in order to graduate. These tests raise issues of discrimination and equal protection (see chap. 6).

DETERMINING COURSE CONTENT

State legislatures occasionally create specific course content requirements. For example, a state statute might specify a required health course covering topics such as the dangers of smoking, alcohol, and other drug use. State regulations may provide even greater detail. Some state boards of education issue required or suggested syllabi for some courses. State testing requirements, such as the statewide final exams used in New York, create an implicit syllabus. Statewide textbook adoption, where employed, is another way for the state to influence course content. Federal statutes and regulations may also affect course content especially regarding the education of disabled students. Within the boundaries of these constraints, the remaining details concerning the content of specific courses are determined by local school boards and their employees.

SELECTING METHODS OF INSTRUCTION

Other than specifying that the language of instruction be English, state law typically has little to say about methods of instruction. Local school boards therefore have broad discretion, often delegated to individual schools and teachers. There has been relatively little litigation in this area (but see the discussion of academic freedom in sec. 9.2).

CHOOSING MATERIALS

More than half the states have some form of statewide textbook adoption. In most of these the legislature or state board appoints a state textbook commission with the power to limit the materials available to schools. Some choice among approved materials is left to the local district. In states without a system of textbook adoption the selection of materials is a local matter. The degree and mode of educator involvement in the selection of materials is variable and may change further as school districts move toward school-based management.

DETERMINING THE POLITICAL AND CULTURAL PERSPECTIVE OF COURSES

State legislation may affect the perspectives of the curriculum by excluding certain courses and topics, by requiring inclusion of patriotic topics and themes, and by mandating emphasis on, for example, the contributions of minority groups to U.S. history. Statewide textbook adoption provides an additional opportunity to shape the political and cultural perspectives of the schools. The judiciary has played a modest role in reviewing and shaping the perspectives of courses and programs, mostly in cases involving freedom of speech. Local school boards have by far the greatest opportunity to affect the political and cultural perspectives of school programs. In fact, many would argue that local control of education exists to permit communities to promote their own values in their schools.

CREATING PUPIL CLASSIFICATION SYSTEMS

State statutes and regulations provide for classification of pupils by age and grade level and establish complex systems for classifying pupils in need of nonstandard educational programs. Federal and state regulations, most often through categorical aid programs, also influence the classification of pupils with special needs (see chap. 7). Local districts retain the basic authority to establish pupil classification schemes for purposes of tracking and ability grouping, but the Constitution and antidiscrimination statutes set significant limitations (see chap. 6).

EXEMPTING STUDENTS FROM COURSES

It is not uncommon for state laws to excuse students from courses if they or their parents object on religious grounds. Whether and under what circumstances religion-based exemptions to courses, topics, and materials are constitutionally required is discussed in sec. 3.4.

3.2 STATUTORY LIMITATIONS ON SCHOOL BOARD CONTROL OF CURRICULUM

A mostly older, but still valid, body of case law involves the claim that a local school board lacks the state-delegated authority to implement a particular course or program. School boards have prevailed in almost all these cases. For example, in 1886, the Supreme Court of Indiana ruled that local boards had the legal authority to require their pupils to study and practice music.[6] Similarly, the Arizona Supreme Court ruled in 1927 that physical education could be included in the curriculum.[7] Much more recently, a California court upheld the authority of a local school board to enter into a contract with a private company in which the school received video equipment in exchange for showing its students a daily ten minute current-events program designed to appeal to teenagers. Plaintiffs objected to the agreement because the programs included two minutes of commercial advertising; however, the court disagreed because the contract and the programs had a valid educational purpose and because individual students could be excused from watching if they wished.[8] Even without the opt-out provision, it is probable that the program would have been approved because the statutory authority of local school boards to offer or require courses of their own choosing is well-settled.

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[6] State *ex rel.* Andrews v. Webber, 8 N.E. 708 (Ind. 1886).

[7] Alexander v. Phillips, 254 P. 1056 (Ariz. 1927).

State laws requiring or authorizing local school districts to offer a particular course usually leave it to the school board to develop its own syllabus. However, where statutes place restrictions on course development or content, schools must be careful to adhere to the restrictions. Many state statutes requiring or authorizing the teaching of sex education place limits on local school board authority. A number of states, including Oklahoma, give parents the right to inspect sex education materials.[9] Idaho requires parental and community involvement in the development of sex education curricula.[10] Some states, Alabama and Kansas among them, give parents the right to have their children excused from sex education classes.[11] A number of state statutes concerning sex education require the teaching of abstinence.[12]

The Louisiana statute authorizing local school districts to offer instruction in sex education is quite restrictive. The statute defines "sex education" as "the dissemination of factual biological or pathological information" about human reproduction and specifies that the instruction "shall not include religious beliefs, practices in human sexuality, nor the subjective moral and ethical judgments of the instructor or other persons." The statute also says that students may not be "tested, quizzed, or surveyed about their personal or family beliefs or practices in sex, morality or religion," that the major emphasis of the program must be to encourage sexual abstinence between unmarried persons, and that no program may counsel or advocate abortion.[13] Based on this statute, parents successfully challenged the sex education program of a Louisiana school. The court agreed with the parents that numerous passages in the program's instructional materials violated the statute (e.g., that the following passage violated the prohibition against religious or subjective judgments: "The full pleasure of genital sex can't be separated from the spiritual, emotional and mental parts of our sexuality").[14]

Parents also have been successful in litigation to force a school to offer a particular course or program when their claim was supported by a specific state statute. Some states require the school board to maintain a kindergarten or provide a foreign language or other course on petition of a specified number of parents or students. In Massachusetts, for example, twenty pupils or five percent of the students enrolled in a high school, whichever is less, may demand that a course be taught.[15] In a number of states, parents have a statutory right to examine the school curriculum.[16]

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[8] Dawson v. East Side Union High Sch. Dist., 34 Cal. Rptr.2d 108 (App. 6 Dist. 1994).
[9] Okla. Stat. tit. 70, §11-1-5.1.
[10] Idaho Code §33-1610.
[11] Ala. Code § 16-40A-2.
[12] R.I. Gen. Laws §16-22-18.
[13] La. Rev. Stat. Ann. § 17:28 1.
[14] Coleman v. Caddo Parish Sch. Bd., 635 So. 2d 1238 (La. App. 1994).
[15] Johnson v. Sch. Comm. of Brockton, 358 N.E.2d 820 (Mass. 1977); *see also*, State *ex rel.* Mueller v. Common Sch. Bd. of Joint Sch. Dist. No. 2 of Princeton, 242 N.W. 574 (Wis. 1932); State *ex rel.* Thayer v. School Dist. of Neb. City, 156 N.W. 641 (Neb. 1916).
[16] *See, e.g.*, Minn. Stat. Ann. §15.141137.

3.3 OBJECTIONS TO RELIGIOUS OBSERVANCES IN PUBLIC SCHOOLS

The past fifty years have seen almost no constitutional litigation challenging the right of states or schools to teach the basic subjects. Although some parents probably oppose the teaching of grammar, music, or physical education for psychological, pedagogical, or idiosyncratic reasons, these parents seem content either to accept the state's authority to control the program of the public schools or to opt for a private school whose program they find more acceptable. (Recall, however, that states may and do regulate the programs of private schools.)

This does not mean that states and their schools now enjoy the freedom to offer or require any program without fear of parental complaint. When school programs concern value-laden issues about which there is no consensus within the community, some parents are sure to object. If the objection can be framed in constitutional terms, litigation often results. In cases when a public school's curriculum is found to conflict with federal or state constitutional principles, a court will prohibit its use.

By far the most common constitutional objection raised against a school program is that it fails to respect the wall of separation between church and state. In the early years of U.S. public schooling the wall of separation was often crossed. Bible readings, organized prayers, celebration of religious holidays, and a variety of other religious observances and ceremonies were common features of school programs in most places. In addition, public schools generally offered a kind of pan-Protestant curriculum that many Catholics and non-Christians found offensive. In fact, objections to the strongly Protestant flavor of the public school curriculum led to the founding of the Catholic schools, by far the largest private school system in the U.S.

By the mid-twentieth century those who objected to overt religious practices in public schools began looking to the courts for relief. In 1962, in *Engel v. Vitale,*[17] the Supreme Court prohibited the organized recitation of a nondenominational prayer especially composed by the state to avoid offending any religious group. The following year the issue of organized Bible readings in school reached the Court in *School District of Abington Township v. Schempp.*

* * *

SCHOOL DISTRICT OF ABINGTON TOWNSHIP v. SCHEMPP

Supreme Court of the United States, 1963
374 U.S. 203

Mr. Justice Clark delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

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[17] 370 U.S. 421 (1962).

I. The Facts in Each Case

NO. 142

The Commonwealth of Pennsylvania by law, 24 Pa. Stat. § 15-1516, as amended, Pub. Law 1928 (Supp. 1960) Dec. 17, 1959, requires that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute, contending that their rights under the Fourteenth Amendment to the Constitution of the United States are, have been, and will continue to be violated unless this statute be declared unconstitutional as violative of these provisions of the First Amendment. They sought to enjoin the appellant school district, wherein the Schempp children attend school, and its officers and the Superintendent of Public Instruction of the Commonwealth from continuing to conduct such readings and recitation of the Lord's Prayer in the public schools of the district pursuant to the statute. A three-judge statutory District Court for the Eastern District of Pennsylvania held that the statute is violative of the Establishment Clause of the First Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment and directed that appropriate injunctive relief issue. . . .

The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they . . . regularly attend religious services. . . . The . . . children attend the Abington Senior High School, which is a public school operated by appellant district.

On each school day at the Abington Senior High School between 8:15 and 8:30 a.m., while the pupils are attending their home rooms or advisory sections, opening exercises are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible "which were contrary to the religious beliefs which they held and to their familial teaching." The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises. Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected. . . .*

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*The trial court summarized his testimony as follows: Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following:

The trial court, in striking down the practices and the statute requiring them, made specific findings of fact that the children's attendance at Abington Senior High School is compulsory and that the practice of reading 10 verses from the Bible is also compelled by law. It also found that:

> The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony for . . . Section 1516 . . . unequivocally requires the exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the "Holy Bible," a Christian document, the practice . . . prefers the Christian religion. The record demonstrates that it was the intention of . . . the Commonwealth . . . to introduce a religious ceremony into the public schools of the Commonwealth.

NO. 119

In 1905 the Board of School Commissioners of Baltimore City adopted a rule. . . . The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists. Following unsuccessful attempts to have the respondent school board rescind the rule, this suit was filed for mandamus to compel its rescission and cancellation. It was alleged that William was a student in a public school of the city and Mrs. Murray, his mother, was a taxpayer therein; that it was the practice under the rule to have a reading on each school morning from the King James version of the Bible; that at petitioners' insistence the rule was amended to permit children to be excused from the exercise on request of the parent and that William had been excused pursuant thereto; that nevertheless the rule as amended was in violation of the petitioners' rights "to freedom of religion under the First and Fourteenth Amendments" and in violation of "the principle of separation between church and state, contained therein. . . ." The petition particularized the petitioners' atheistic beliefs and stated that the rule, as practiced, violated their rights

> in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith.

The respondents demurred and the trial court, recognizing that the demurrer admitted all facts well pleaded, sustained it without leave to amend. The Maryland Court of Appeals affirmed, the majority of four justices holding the exercise not in violation of the First and Fourteenth Amendments, with three justices dissenting. We granted certiorari. . . .

III.

Almost a hundred years ago in *Minor v. Board of Education of Cincinnati*, Judge Alphonso Taft, father of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of

> absolute equality before the law, of all religious opinions and sects. . . . The government is neutral, and, while protecting all, it prefers none, and it disparages none.

He said that he thought his children would be "labeled as 'odd balls'" before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable "to lump all particular religious differences or religious objections [together] as 'atheism'" and that today the word "atheism" is often connected with "atheistic communism," and has "very bad" connotations, such as "un-American" . . . with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their "homeroom" and that this carried with it the imputation of punishment for bad conduct.

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Before examining this "neutral" position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government it is well that we discuss the reach of the Amendment under the cases of this Court.

First, this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. . . .

Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in *Everson* [*v. Board of Education*, 330 U.S. 1 (1947)] the Court said that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." And Mr. Justice Jackson, dissenting, agreed:

> There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity.

Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

> The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

The same conclusion has been firmly maintained ever since that time. . . . [I]n *Everson*, this Court . . . held that the Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

And Mr. Justice Jackson, in dissent, declared that public schools are organized

> on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. . . .

Finally, in *Engel v. Vitale*, only last year, these principles were so universally recognized that the Court, without the citation of a single case and over the sole dissent of Mr. Justice Stewart, reaffirmed them. The Court found the 22-word prayer used in "New York's program of daily classroom invocation of God's blessings as prescribed in the Regent's prayer . . . [to be] a religious activity." It held that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." In discussing the reach of the Establishment and Free Exercise Clauses of the First Amendment the Court said:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

And in further elaboration the Court found that the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion." When government, the Court said, allies itself with one particular form of religion, the inevitable result is that it incurs "the hatred, disrespect and even contempt of those who hold contrary beliefs." . . .

V.

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. . . . The trial court in No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

There is no such specific finding as to the religious character of the exercises in No. 119, and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. The case came up on demurrers of course, to a petition which alleged that the uniform practice under the rule had been to read from the King James version of the Bible and that the exercise was sectarian. The short answer, therefore, is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. . . . Applying that rule to the facts of these cases, we affirm the judgment in No. 142. In No. 119, the judgment is reversed and the cause remanded to the Maryland Court of Appeals for further proceedings consistent with this opinion.

* * *

Schempp explains the rationale for the development of the first two parts of the *Lemon* test: purpose and primary effect (see sec. 2.5). These are the tests that are usually applicable to allegations that school programs violate the Establishment Clause. The Court interpreted the clause as prohibiting any governmental practice that advances or inhibits either one religion as compared to another or religion in general. Government-sponsored prayers and readings from holy books, even if arguably nondenominational, were found to have both the purpose and primary effect of advancing religion in general. Even when participation was voluntary, the Court recognized that state sponsorship of religious exercises signals approval and, in the context of the public school, tends to encourage conformity to prevailing practice and belief.

The Court rejected the argument that removing organized prayer from school was an expression of hostility toward religion or that it established a "religion of secularism." Nor did prohibiting schools from formally organizing and supporting prayers infringe on the free exercise of religion of those who wished to pray. Nothing prevented students from praying voluntarily before or after school or even silently during the school day.

Since the 1960s, federal courts have relied on the analyses in *Schempp* and *Vitale* and on the *Lemon* test to decide a number of other cases concerning prayer and religious texts in schools. In 1980, in *Stone v. Graham*,[18] the Supreme Court disallowed a Kentucky statute requiring schools to display copies of the Ten Commandments purchased with private funds. The Court found that the display had no educational function or other secular purpose despite the state's attempt to claim one:

> The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The trial court found the "avowed" purpose of the statute to be secular, even as it labeled the statutory declaration "self-serving." Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. . . . The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can blind us to that fact.

Similarly, in a 1993 Michigan case, a federal district court found that the posting of a two-foot by three-foot picture of Jesus at a busy intersection in the school's hallways violated the Establishment Clause.[19]

In *Karen B. v. Treen*,[20] the Fifth Circuit disallowed an opening exercise in which a student voluntarily selected and read a prayer. Likewise, in *Collins v. Chandler Unified School District*,[21] the Ninth Circuit prohibited the practice of allowing a student to lead a school assembly in prayer even if attendance at the assembly was voluntary. The Court further ruled that prohibiting the practice did not violate the free exercise rights of students who wished to pray.

In 1985, a federal district court in Michigan rejected the argument that academic freedom protects a teacher's right to pray and read the Bible in class.[22] In 1989, the Eleventh Circuit banned the practice of coaches leading their players in prayer before an athletic event,[23] and in 1992, in *Lee v. Weisman*, the Supreme Court resolved a disagreement in the lower courts by ruling that opening prayers at graduation ceremonies are unconstitutional. The Court noted that such "state-sponsored and state-directed religious exercise[s]" create "subtle coercive pressures" for participation and conformity of belief.[24]

Shortly after *Lee v. Weisman*, the Fifth Circuit reconsidered a challenge to a school's policy of allowing seniors to choose student volunteers to deliver "nonsectarian, nonproslytizing" prayers at their graduation ceremony. The court approved the policy and found that its secular purpose was to "solemnize the occasion," that there was little likelihood that its primary effect would be to advance religion, and that there was no official endorsement of religion since the decision of whether to have prayers was left to the students. Unlike *Lee*, the school did not exercise control of the content or source of the prayers nor were there subtle coercive pressures to conform because the school itself had not initiated the prayers.[25] However, both the Third and Ninth Circuits have come to the opposite conclusion: student-initiated prayers at graduation ceremonies violate both the purpose and primary effect tests and are therefore unconstitutional.[26] The latter two opinions seem more in keeping with the spirit and substance of *Lee*.

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[18] 449 U.S. 39 (1980).

[19] Washegesic v. Bloomingdale Pub. Sch., 813 F. Supp. 559 (W.D. Mich. 1993), *aff'd*, 33 F.3d 679 (6th Cir. 1994).

[20] 653 F.2d 897 (5th Cir. Unit A Aug. 1981), *aff'd*, 455 U.S. 913 (1982).

[21] 644 F.2d 759 (9th Cir. 1981).

[22] Breen v. Runkel, 614 F. Supp. 355 (W.D. Mich. 1985).

[23] Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989).

[24] 505 U.S. 577 (1992).

In response to rulings against organized prayer in public schools some states and school districts have incorporated moments of silence into their programs. In *Wallace v. Jaffree*,[27] the Supreme Court considered the issue of whether an Alabama law authorizing public schools to incorporate "a period of silence for 'meditation or voluntary prayer' is a law respecting the establishment of religion within the meaning of the First Amendment." Based on the specific wording of this moment of silence statute and the legislative history of its adoption, the Court concluded that the law had no secular purpose. The law's sponsor had said that it was an "effort to return voluntary prayer to the schools." The specific mention of prayer in the law indicated that the state intended to characterize prayer as a favored practice. Wrote the Court, "Such an endorsement is not consistent with the established principle that Government must pursue a course of complete neutrality toward religion." Of great interest in the opinion, however, is the implication that a state statute that only authorized a moment of silence—without any reference to prayer—might be constitutional. Other federal courts have found formally organized moments of silence unconstitutional if their purpose was to encourage prayer.[28]

The Supreme Court's statement in *Schempp* that the study of the Bible was permissible "when presented objectively as part of a secular program of education," has tempted some schools to use Bible study as a ruse for the promotion of religion. Courts have consistently declared unconstitutional programs of Bible instruction in which the hiring and supervision of teachers and the selection of materials was controlled by a private religious group. Instructors for a course that studies the Bible may not be hired on the basis of their religious belief and religious tenets cannot be advanced in the course. If religious materials are merely used as examples of a type of literature or as part of a study of secular history, world cultures, or comparative religion, then the Constitution has not been violated.[29] Thus, a federal district court in New Jersey rejected a challenge to a school's posting of calendars that recognized a variety of national, cultural, ethnic and religious holidays.[30] In fact, the systematic deletion of all religious materials from the curriculum would raise a constitutional problem if motivated by hostility toward religion.

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[25] Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992).

[26] ACLU of N.J. v. Black Horse Pike Region 1 Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated*, 515 U.S. 1154 (1995).

[27] 472 U.S. 38 (1985).

[28] May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed*, 484 U.S. 72 (1987); Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (S.D. W.Va. 1985). *But see*, Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976).

[29] Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996); Hall v. Board of Sch. Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. Unit B Sept. 1981), *modified*, 707 F.2d 464 (11th Cir. 1983); Doe v. Human, 725 F. Supp. 1499 (W.D. Ark. 1989) and 725 F. Supp. 1503 (W.D. Ark. 1989), *aff'd*, 923 F.2d 857 (8th Cir. 1990); Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Vir. 1983); Wiley v. Franklin, 474 F. Supp. 525 (E.D. Tenn. 1979).

School officials sometimes permit or even encourage outside organizations, such as the Gideons, to distribute free Bibles to students on school grounds. In 1977, the Fifth Circuit Court prohibited a Bible distribution program citing three other cases that reached the same conclusion. In reaching its decision, the court stressed that the school's distribution program was not neutral but, rather, favorable to the Gideon movement and religion generally.[31] In a similar, more recent decision, the Seventh Circuit blocked a Bible distribution program within the fifth grade classrooms of a school.[32] However, in other recent cases, Bible distribution has been permitted in school hallways or grounds where access has been granted to other outside organizations such as the Boy Scouts and where students are free to accept Bibles or not.[33]

Is it permissible to close schools for religious holidays? Although there has not been litigation specifically addressing the ubiquitous practice of closing school on and around Christmas, it seems likely that it would be judged constitutionally permissible because, in addition to its religious significance, Christmas has become an important secular celebration in the U.S. and much of the world.[34] That it would be impossible to provide a safe school environment on Christmas because so many teachers would be absent provides an additional justification for closing the school. The same reasoning might apply to Easter, but the issue is moot because schools are closed on Sundays anyway. Structuring the school calendar around other religious holidays is more problematic. The safe-environment argument might apply to any holiday that most teachers would take anyway. Also, closing school on any day that the state has declared a legal holiday is probably permissible. A federal district court in Hawaii upheld a state law that made Good Friday a legal (and school) holiday, saying that Good Friday had the same constitutional standing as Thanksgiving and Christmas.[35] However, the Seventh Circuit reached the opposite conclusion and specifically rejected the argument that Good Friday was like Thanksgiving and Christmas. Good Friday, said the court, "is a day of solemn religious observance, and nothing else, for believing Christians, and no one else."[36]

Despite, or perhaps because of, its dual status as a religious and secular holiday, Christmas creates difficult legal and political problems when it is celebrated at school. What symbols of Christmas and the Christmas season may a school display? The confusion of constitutional doctrine in this area was evident in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*[37] when a fragmented Supreme Court prohibited the display of a crèche in a courthouse but upheld the display of a menorah and Christmas tree outside another public building. What acknowledgments of the origins and meaning of Christmas are permissible in school? When does a "holiday pageant" become too much like a religious service to be allowed? The following is the only federal appellate court opinion to consider these issues. Both the majority opinion and a diametrically dissenting opinion are presented and once again demonstrate the complexity of these issues.

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[30] Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993).

[31] Meltzer v. Board of Pub. Instruction of Orange County, 548 F.2d 559 (5th Cir. 1977), *rev'd in part*, 577 F.2d 311 (5th Cir. 1978) (en banc).

[32] Berger v. Rennselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993).

[33] Peck v. Upshur County Bd. of Educ., 941 F. Supp. 1465 (N.D. W.Va. 1996); Schanou v. Lancaster County Sch. Dist. No. 160, 863 F. Supp. 1048 (D. Neb. 1994), *vacated*, 62 F.3d 1040 (8th Cir. 1995).

[34] Koenick v. Felton, 973 F. Supp. 522 (D. Md. 1997).

[35] Cammack v. Wahihee, 673 F. Supp. 1524 (D. Haw. 1987), *aff'd.*, 932 F.2d 765 (9th Cir. 1991).

[36] Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).

FLOREY v. SIOUX FALLS SCHOOL DISTRICT 49-5

United States Court of Appeals for the Eighth Circuit, 1980
619 F.2d 1311

Heaney, Circuit Judge.

I.

In response to complaints that public school Christmas assemblies in 1977 and prior years constituted religious exercises, the School Board of Sioux Falls, South Dakota, set up a citizens' committee to study the relationship between church and state as applied to school functions. The committee's deliberations, which lasted for several months, culminated in the formulation of a policy statement and set of rules outlining the bounds of permissible school activity. After a public hearing, the School Board adopted the policy statement and rules recommended by the committee.

The appellants brought suit for declaratory and injunctive relief, alleging that the policy statement and the rules adopted by the School Board violate the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution.

. . .

The appellants' claim is that the School Board policy and rules are unconstitutional both on their face and as applied. . . .

II.

[The Supreme] Court has developed a three-part test for determining when certain governmental activity falls within the constitutional boundaries:

> First, the [activity] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . , finally, the [activity] must not foster "an excessive governmental entanglement with religion."

A. PURPOSE

The appellants' contention that the School Board's adoption of the policy and rules was motivated by religious considerations is unsupportable. The record shows that the citizens' committee was formed and the rules drawn up in response to complaints that Christmas observances in some of the schools in the district contained religious exercises. The motivation behind the rules, therefore, was simply to ensure that no religious exercise was a part of officially sanctioned school activities. This conclusion is supported by the opening words of the policy statement: "It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged." The statement goes on to affirmatively declare the purpose behind the rules:

> The Sioux Falls School District recognizes that one of its educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.

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[37] 492 U.S. 573 (1989); *see also*, Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995).

The express language of the rules also leads to the conclusion that they were not promulgated with the intent to serve a religious purpose. Rule 1 limits observation of holidays to those that have both a religious and a secular basis. Solely religious holidays may not be observed. Rule 3 provides that music, art, literature and drama having a religious theme or basis may be included in the school curriculum only if "presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday." Similarly, Rule 4 permits the use of religious symbols only as "a teaching aid or resource" and only if "such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature." We view the thrust of these rules to be the advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.

This purpose is quite different from the express and implied intent of the states of New York, Pennsylvania and Maryland in the Supreme Court "School Prayer Cases." . . . Since prayer, by its very nature, is undeniably a religious exercise, the conclusion is inescapable that the advancement of religious goals was the purpose sought by the school officials in *Engel*. Indeed, the state officials published the prayer in a document entitled "Statement on Moral and Spiritual Training in the Schools." There can be little doubt that their intent was to promote "spiritual" ends. . . .

The appellants argue that the "legislative" history of Rule 1 compels the conclusion that the rule was designed to advance religion. The basis for this argument is a proposed amendment to Rule 1 introduced before both the citizens' committee and the School Board. The proposed amendment would have added to Rule 1 the following words: "Such observances shall be limited to secular aspects of these holidays." The amendment was defeated by both the citizens' committee and the School Board. The School Board rejected the proposal, appellants assert in their brief, "because it wanted to allow schools to observe the religious basis of holidays." This, they maintain, is an unconstitutional purpose. We do not agree that the rejection of the proposed amendment renders the School Board rules constitutionally infirm. First, the record is devoid of evidence indicating the reasons the proposal was rejected. A number of possibilities suggest themselves, including the ambiguity of the proposed addition. The appellants' assertion that the rejection was due to the School Board's desire "to observe the religious basis of holidays" is thus unsupported. Furthermore, even if the appellants' contention were correct, the Constitution does not necessarily forbid the use of materials that have a "religious basis." Government involvement in an activity of unquestionably religious origin does not contravene the Establishment Clause if its "present purpose and effect" is secular. Thus, although the rules permit the schools to observe holidays that have both a secular and a religious basis, we need not conclude that the School Board acted with unconstitutional motives. To the contrary, we agree with the district court's finding that the School Board did not adopt the policy statement and rules for the purpose of advancing or inhibiting religion.

B. EFFECT

The appellants contend that, notwithstanding the actual intent of the School Board, the "principal or primary effect" of the rules is to either advance or inhibit religion. We cannot agree. The First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited. Hence, the *study* of religion is not forbidden "when presented objectively as part of a secular program of education." We view the term "study" to include more than mere classroom instruction; public performance may be a legitimate part of secular study. This does not mean, of course, that religious ceremonies can be performed in the public schools under the guise of "study." It does mean, however, that when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content. As the district court noted in its discussion of Rule 3, "[t]o allow students *only* to study and *not* to perform [religious art, literature and music when] such works . . . have developed an independent secular and artistic significance would give students a truncated view of our culture."

The appellants assert, however, that something more than secular study is authorized by the Sioux Falls rules. They point to Rule 1, which states that holidays that have a religious and secular basis may be "observed" in the public schools. "Observation," they maintain, necessarily connotes religious ceremony or exercise and the rule thus has the impermissible effect of advancing religion.

A review of the policy statement and rules as a whole leads us to conclude that the appellants' emphasis of the word "observe" is misplaced and their interpretation of it incorrect. First, as noted in section II.A. of this opinion, the rules must be read together with the policy statement of the School Board. That statement makes it clear that religion is to be neither promoted nor disparaged in the Sioux Falls schools. Consequently, any ambiguity in the meaning of the word "observed" must be resolved in favor of promoting that policy. Moreover, the only evidence presented on the definition of the word "observed" was the testimony of the School Superintendent, Dr. John Harris. Dr. Harris explained that "observed" means "that programs with content relating to both the secular and religious basis of [the holiday] could be performed, could be presented in the school." As noted earlier, we view performance or presentation to be a legitimate and important part of "study" in the public schools. Thus, the use of the word "observe" does not mean that the rules have the effect of advancing religion so long as the religious content of the programs is "presented objectively as part of a secular program of education."

To determine whether religion is advanced or inhibited by the rules, then, we must look to see if a genuine "secular program of education" is furthered by the rules. It is unquestioned that public school students may be taught about the customs and cultural heritage of the United States and other countries. This is the principal effect of the rules. They allow the presentation of material that, although of religious origin, has taken on an independent meaning.

The district court expressly found that much of the art, literature and music associated with traditional holidays, particularly Christmas, has "acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage."* Furthermore, the rules guarantee that all material used has secular or cultural significance: Only holidays with both religious and secular bases may be observed; music, art, literature and drama may be included in the curriculum only if presented in a prudent and objective manner and only as a part of the cultural and religious heritage of the holiday; and religious symbols may be used only as a teaching aid or resource and only if they are displayed as a part of the cultural and religious heritage of the holiday and are temporary in nature. Since all programs and materials authorized by the rules must deal with the secular or cultural basis or heritage of the holidays and since the materials must be presented in a prudent and objective manner and symbols used as a teaching aid, the advancement of a "secular program of education," and not of religion, is the primary effect of the rules.

The appellants argue that, despite the secular benefits, inclusion of material with a religious theme, basis or heritage invalidates the rules. In support of this assertion, the appellants point out that several of appellants' witnesses, all of them ordained clergymen, testified that the singing of Christmas carols would have some religious effect on them. But the appellants misread the test laid down by the Supreme Court. As noted, *Lemon v. Kurtzman*, permits a given activity if "its principal or primary effect [is] one that neither advances nor inhibits religion." It would be literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents. School administrators should, of course, be sensitive to the religious beliefs or disbeliefs of their constituents and should attempt to avoid conflict, but they need not and should not sacrifice the quality of the students' education. They need only ensure that the primary effect of the school's policy is secular. The district court's finding that they have done this by the challenged rules is not clearly erroneous.

The distinction between an activity that primarily advances religion and one that falls within permissible constitutional limits may be illustrated by comparing the 1977 kindergarten Christmas program found by the district court to be an impermissible religious activity and the programs authorized by the new School Board guidelines. The 1977 program at one of the elementary schools contained a segment that, in the words of the district court, "was replete with religious content including a responsive discourse between the teacher and the class entitled, 'The Beginners Christmas Quiz.'" The "Quiz" read as follows:

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*The singing of "Christmas carols" appears to be a primary focal point of appellants' objections to the rules. These carols had their origin in England, France, Germany and other European countries. The first carols written in the United States appeared in the Nineteenth Century, but European carols were sung far earlier. . . . Carols were banned for a period in the New England Colonies by the Puritans, but they have been sung in homes, schools, churches and public and private gathering places during the Christmas season in every section of the United States since that time. Today, carols are sung with regularity on public and commercial television and are played on public address systems in offices, manufacturing plants and retail stores in every city and village.

Many carols have a religious theme; some do not. As in the centuries gone by, some persons object to the singing of carols with a religious basis in any place but the church or home because they feel that to do so debases religion; others have the same objection but because they feel it enhances religion. We take no part in this argument, it being entirely clear to us that carols have achieved a cultural significance that justifies their being sung in the public schools of Sioux Falls, South Dakota, if done in accordance with the policy and rules adopted by that school district.

Teacher: Of whom did heav'nly angels sing,
And news about His birthday bring?
Class: Jesus.
Teacher: Now, can you name the little town
Where they the Baby Jesus found?
Class: Bethlehem.
Teacher: Where had they made a little bed
For Christ, the blessed Saviour's head?
Class: In a manger in a cattle stall.
Teacher: What is the day we celebrate
As birthday of this One so great?
Class: Christmas.

This "Quiz" and other similar activities constituted, the district court found, "a predominately religious activity" which exceeded constitutional bounds. We agree with this characterization and with the district court's observation that similar programs would be prohibited by the new rules. The administration of religious training is properly in the domain of the family and church. The First Amendment prohibits public schools from serving that function.

C. ENTANGLEMENT

The appellants contend that the new guidelines in Sioux Falls unconstitutionally "foster 'an excessive government entanglement with religion.'" All the Supreme Court cases cited by the appellants in support of the "entanglement" test deal with governmental aid to sectarian institutions, not with the permissible scope of activity in the public schools. In a "parochaid" case, the court is presented with a situation in which the state is involving itself with a concededly religious activity or institution. The real danger is the potential for state repression of such institutions. In the present case, by contrast, the school district is called upon to determine whether a given activity is religious. This type of decision inheres in every curriculum choice and would be faced by school administrators and teachers even if the rules did not exist. Indeed, the rules are guidelines designed to aid in the decisionmaking process. Rather than entangling the schools in religion, the rules provide the means to ensure that the district steers clear of religious exercises. We think the district court was correct in finding that the new rules do not unconstitutionally entangle the Sioux Falls school district in religion or religious institutions.

III.

The appellants also contend that implementation of the policy and rules of the Sioux Falls School Board should be enjoined because the rules violate the Free Exercise Clause of the First Amendment. This contention does not withstand scrutiny.

The public schools are not required to delete from the curriculum all materials that may offend any religious sensibility. As Mr. Justice Jackson noted in *McCollum v. Board of Education*, 333 U.S. 203, 235 (1948),

> Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them . . . has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.

These inevitable conflicts with the individual beliefs of some students or their parents, in the absence of an Establishment Clause violation, do not necessarily require the prohibition of a school activity. On the other hand, forcing any person to participate in an activity that offends his religious or nonreligious beliefs will generally contravene the Free Exercise Clause, even without an Establishment Clause violation. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). In this case, however, the Sioux Falls School Board recognized that problem and expressly provided that students may be excused from activities authorized by the rules if they so choose.

IV.

We recognize that this opinion affirming the district court will not resolve for all times, places or circumstances the question of when Christmas carols, or other music or drama having religious themes, can be sung or performed by students in elementary and secondary public schools without offending the First Amendment. The constitutionality of any particular school activity conducted pursuant to the rules, in association with any particular holiday, cannot be determined unless and until there is a specific challenge, supported by evidence, to the school district's implementation of the rules. We simply hold, on the basis of the record before us, that the policy and rules adopted by the Sioux Falls Board of Education, when read in the light of the district court's holding that segments of the 1977 Christmas program at one of the elementary schools were impermissible, are not violative of the First Amendment. For the foregoing reasons, the judgment of the district court is affirmed. . . .

* * *

McMillian, Circuit Judge, dissenting:

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II. THE SECULAR LEGISLATIVE PURPOSE TEST

First, I am not totally persuaded that the policy and rules reflect a clearly secular legislative purpose. It cannot be overlooked that complaints about the religious content of several Christmas assemblies prompted the formation of the citizens' advisory committee and the adoption of the policy and rules by the school board. Against this background I am inclined to view the school board's rejection of the proposed "secular aspects only" amendment as indicative of a purpose to permit more than the study (including performance when appropriate) of religion, subjects with religious content or significance and religious traditions. In addition, the rules refer exclusively to "religious holidays." No doubt this singular orientation reflects the non-existence of agnostic or atheistic occasions. The rules do not address the observance of *non-religious* holidays, such as Veterans Day, Arbor Day, Memorial Day, Labor Day, the birthdays of various presidents or civic leaders (i.e., the controversy over whether Martin Luther King's birthday should be a holiday). To the extent the policy and rules focus only on religious holidays, I would find the policy and rules unconstitutionally operate as a preference of religion.

Like the majority, I too accept "the thrust of these rules to be the advancement of the students' knowledge of society's cultural and religious heritage." The opening words of the policy statement takes the commendable position that "no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged." I do not deny that knowledge of society's cultural and religious heritage and the encouragement of tolerance (religious and other kinds) and mutual understanding are admirable secular goals. However, I find several problems in the relationship between the rules and these secular goals. First, I do not understand how the *observance* of religious holidays promotes these secular goals. Moreover, I do not understand how the observance of particular religious holidays [*i.e.*, Christian and Jewish holidays, but not others (*i.e.*, Ramadan, North American Indian holidays, Hindu holidays)] encourages student knowledge and appreciation of religious and cultural diversity. For example, the observance of the holidays of religions less familiar to most American public school children than either Christian or Jewish holidays would seem more likely to increase student knowledge and promote religious tolerance. . . .

Christmas is especially difficult. Despite its many and diverse secular manifestations, Christmas remains an event of immense and undiminished significance to Christians: the celebration of the birth of Christ. . . . Unlike Thanksgiving, Christmas has no *inherent* secular basis as the anniversary of an American historical event. Christmas has nonetheless acquired an undeniable secular importance and general acceptance as a holiday season over the years. As noted in *Allen v. Morton*, 495 F.2d 65 (1973), which involved an Establishment Clause challenge to the annual "Christmas Pageant of Peace" celebrated on federal parkland adjacent to the White House that included the display of a lifesize Nativity scene or "creche," Christmas holiday observances are often associated with the laudable secular theme of expressing a national desire for "Peace on Earth, Goodwill Toward Men." Christmas is also a federal legal public holiday, and is observed directly and indirectly in many government activities: for example, the President lights a national Christmas tree, the post office issues commemorative stamps for the Christmas season which feature artwork with Christian themes, local governments display Christmas trees and Christmas decorations on public buildings, city streets and city squares.

Nonetheless, what is constitutionally unobjectionable for adults or in a non-public school context may be prohibited for public school children. . . . To the extent the school district seeks to justify the *observance* of the Christmas holiday as an occasion to advance the students' knowledge of cultural and religious knowledge, diversity, and tolerance or to promote peace among mankind, these objectives could be accomplished by the *observance* of a more neutral "holiday," for example United Nations Day. "Such substitutes would, I think, be unsatisfactory or inadequate only to the extent that the present activities do in fact serve religious goals." . . .

III. THE PRIMARY EFFECT TEST

Second, do the rules, particularly to the extent they permit the preparation and presentation of Christmas assemblies, have a principal or primary effect which either advances or inhibits religion? Unlike the majority, I think they do. Christmas assemblies have a substantial impact, both in favor of one religion and against other religions and nonbelief, on the school district employees, the students, the parents and relatives of the students and the community.

When a [school district] so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing . . . their belief given official sanction and special status.

By sponsoring Christmas assemblies which feature programs of traditional Christmas music, including Christmas carols, only during the Christmas season, the school district has in effect endorsed the beliefs of one religion. The school district has placed "the power, prestige and financial support of government" behind the Christmas holiday. . . .

IV. THE EXCESSIVE ENTANGLEMENT TEST

Third, I think the rules necessarily foster an excessive entanglement of the school district with religion. As noted by the majority, the rules call upon the school district to determine whether a given activity is religious.

> The [school board] may also find itself effectively defining religion or censoring the content of religious materials. . . . [T]he secular public school system could become the focal point for the competition of all religious beliefs [and nonbelief]. The courts and other state officials would be under a continuing duty to make certain that one faith was not in effect being endorsed and promoted by [the observance of religious holidays]. Indeed, it is ironic that the more fairly and objectively the guidelines are enforced, the more the school board will become immersed in serious religious judgments. . . .

Of course, it is precisely this type of "excessive and enduring entanglement between state and church," which is proscribed by the Establishment Clause. . . .

In addition to administrative entanglement, the rules also enmesh the school district in another type of entanglement . . . , that is, "the potential for political divisiveness related to religious belief and practice." As in the case of financial aid to parochial schools, proponents in favor of religious holiday observances, opponents against religious holiday observances and advocates for specific religious (or non-religious) holidays will engage in considerable political activity either to elect school board members whose views are compatible with their own views or to influence the school board. . . .

I would reverse the judgment of the district court.

◆

The study and performance of religious music raises particularly tricky issues. Much of the music regularly used in many public schools was originally written to promote religion and continues to play a part in religious observances. However, some of the same music is part of the secular U.S. culture. Certainly, as the *Florey* opinion suggests, a school's music program should not have the appearance of a religious ceremony, even a nondenominational one. However, schools need not avoid all songs that mention religious holidays or symbols or even music with liturgical origins.

In 1997, the Tenth Circuit rejected a challenge to a Salt Lake City high school's performance of "many" pieces of religious music and to its presentation of concerts in churches and other religious venues.[38] In another recent case, the Fifth Circuit approved the use of a piece entitled, "The Lord Bless You and Keep You," as the theme song of a high school choir.[39] These cases indicate that the use of religious music is generally permissible as long as it is part of a secular program of music instruction and performance.

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[38] Bauchman v. West High Sch., 132 F.3d 542 (10th Cir. 1997).

[39] Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995).

3.4 RELIGIOUS AND MORAL OBJECTIONS TO COURSE CONTENT AND MATERIALS

The last section considered objections to prayer and other traditional religious practices in the school. This section addresses the issues raised by the teaching of courses, theories, or topics and the use of materials claimed to promote or denigrate religious beliefs or practices. Plaintiffs may argue that the Establishment Clause prohibits shaping the curriculum in accordance with religious doctrine, for example, by prohibiting the teaching of evolution or requiring creation science. Other plaintiffs rely on the Free Exercise Clause to seek exemption from unwanted topics and materials. Christian fundamentalism, characterized by a literal interpretation of the Bible, is a significant force in U.S. social and political life. Fundamentalists at times have sought to shape the curriculum of the public schools in accordance with their religious beliefs. In *Epperson v. Arkansas*,[40] the Supreme Court considered the constitutionality of an Arkansas law that made it illegal for a public school teacher "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," that is, the theory of evolution. The case was brought by a biology teacher who was placed in an untenable position when her school district adopted a biology textbook containing a chapter on evolution. Thus, she was both required to and prohibited from teaching the theory. Although affirming the general right of the state "to prescribe the curriculum for its public schools," the Court pointed out that the state's power over curriculum is limited by the mandates of the Establishment Clause. To determine whether the First Amendment had been violated, the Court considered the origin and purpose of the law:

> In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. . . .
>
> Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read.

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[40] 393 U.S. 97 (1968). For historical background, *see also*, Scopes v. State, 289 S.W. 363 (1927).

Having found no secular purpose to support the antievolution law, the Court resolved the teacher's dilemma by finding the law unconstitutional.

Epperson has been the basis of several lower court opinions blocking school boards from accommodating the religious preferences of parents by removing materials, topics, or courses from the curriculum.[41] However, at least one circuit court decision affirms the legitimacy of permitting all people, even those with religious motivations, to have the opportunity to influence educational policy. The case involved a challenge to a school board rule, adopted against a background of local church opposition to social dancing, that barred the use of school facilities for dancing. Plaintiffs claimed that the no dancing rule was religiously motivated, but the court concluded that there was insufficient proof that the rule had been adopted for religious reasons:

> The mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion. . . . We simply do not believe elected governmental officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions.[42]

Because *Epperson* effectively prevented legislatures from barring the teaching of evolution, several fundamentalist groups have attempted to use judicial means to eliminate its instruction. In *Wright v. Houston Independent School District*,[43] the plaintiffs claimed that the uncritical teaching of evolution, ignoring the biblical account of creation, established the religion of secularism. The district court disagreed saying it was "not the business of the government to suppress real or imagined attacks upon a particular religious doctrine. Teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise."[44]

The unsuccessful effort to obtain legislative or judicial elimination of evolution from the public school curriculum has prompted a different strategy; namely, to get the state legislature to require the teaching of scientific creationism as an alternative theory. These "balanced treatment" laws have required, for example, that if evolution is taught, then scientific creationism also must be taught. However, the courts have nullified balanced treatment laws because, as the Supreme Court explained in *Edwards v. Aguillard*,[45] their purpose was "to advance the religious viewpoint that a supernatural being created humankind" and thus, to promote religion. The Court summarized its conclusion as follows:

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[41] Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771 (8th Cir. 1982); Hopkins v. Hamden Bd. of Educ., 289 A.2d 914 (Conn. C.P. 1971).

[42] Clayton v. Place, 884 F.2d 376 (8th Cir. 1989).

[43] 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973).

[44] *See also*, Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975).

[45] 482 U.S. 578 (1987); *see also*, McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).

> [T]he Purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. As in *Epperson*, the legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator. . . . Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.
>
> We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. . . . [T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular doctrine, the Act furthers religion in violation of the Establishment Clause. . . .

Disappointed with the outcome of *Edwards*, a school board in Louisiana adopted a policy that required its teachers to read the following statement every time evolution was mentioned in one of its classrooms:

> It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.
>
> It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

A federal district court found the policy unconstitutional and noted that there was no other scientific theory in the schools' curriculum that the board did not endorse. Also, the court could not, after reviewing transcripts of the school board's discussion of the policy, find any secular purpose for it. Significant for the court was the refusal of the sponsor of the policy to agree to the removal of the phrase "the Biblical version of Creation."[46]

Some fundamentalists have argued that a public school's program violates the Establishment Clause by promoting the religion of secular humanism. In *Smith v. Board of School Commissioners of Mobile County*,[47] the plaintiffs claimed that certain elementary and secondary textbooks in history, social studies, and home economics promoted the religion of secularism. The district court upheld this claim by embracing a broad definition of religion, deciding that secular humanism, despite its atheistic tenets, was a religion, and concluding that the books in question promoted secular humanism, thus violating the Establishment Clause. On appeal, the Eleventh Circuit reversed the decision.

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[46] Freiler v. Tangipahoa Parish Bd. of Educ., 975 F. Supp. 819 (E.D. La. 1997).

[47] 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

SMITH v. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY

United States Court of Appeals for the Eleventh Circuit, 1987
827 F.2d 684

Johnson, Circuit Judge:

Appellants, Alabama State Board of Education and Wayne Teague ("Board") and Malcolm Howell, et al. ("Defendant-Intervenors") appeal the district court's order enjoining the use in Alabama public schools of forty-four textbooks approved by the Board for inclusion on the State-Adopted Textbook List, the use of which the district court found to be a violation of the establishment clause of the first amendment. We reverse.

I. BACKGROUND

. . . A bench trial was held October 6–22, 1986 with regard to Appellees' claims. Appellees' evidence focused on elementary and secondary school textbooks in the areas of history, social studies, and home economics, which were on the Alabama State Approved Textbook List, and which Appellees argued unconstitutionally established the religion of secular humanism. The district court found that use of forty-four of these textbooks violated the establishment clause of the first amendment, and permanently enjoined the use of the textbooks in the Alabama public schools. This appeal followed.

II. DISCUSSION

The first amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion. . . ." The district court found that secular humanism constitutes a religion within the meaning of the first amendment and that the forty-four textbooks at issue in this case both advanced that religion and inhibited theistic faiths in violation of the establishment clause. The Supreme Court has never established a comprehensive test for determining the "delicate question" of what constitutes a religious belief for purposes of the first amendment, and we need not attempt to do so in this case, for we find that, even assuming that secular humanism is a religion for purposes of the establishment clause, Appellees have failed to prove a violation of the establishment clause through the use in the Alabama public schools of the textbooks at issue in this case.

The religion clauses of the first amendment require that states "pursue a course of complete neutrality toward religion." . . . The establishment clause, however, has not been interpreted as requiring mechanical invalidation of all government conduct conferring benefit on or giving special recognition to religion, but rather has been seen as erecting a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." . . .

The parties agree that there is no question of a religious purpose or excessive government entanglement in this case and our review of the record confirms that conclusion. Our inquiry, therefore, must center on the second *Lemon* criterion: whether use of the challenged textbooks had the primary effect of either advancing or inhibiting religion.

The effect prong [of the *Lemon* test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. If government identification with religion conveys such a message of government endorsement or disapproval of religion, then "a core purpose of the Establishment Clause is violated." In determining the message conveyed by use of the textbooks in this case, we recognize that we must use "particular care" as "many of the citizens perceiving the governmental message are children in their formative years."

The district court found that the home economics, history, and social studies textbooks both advanced secular humanism and inhibited theistic religion. Our review of the record in this case reveals that these conclusions were in error. As discussed below, use of the challenged textbooks has the primary effect of conveying information that is essentially neutral in its religious content to the school children who utilize the books; none of these books convey a message of governmental approval of secular humanism or governmental disapproval of theism.

A. Home Economics Textbooks

The district court found that the home economics textbooks required students to accept as true certain tenets of humanistic psychology, which the district court found to be "a manifestation of humanism." In particular, the district court found that the books "imply strongly that a person uses the same process in deciding a moral issue that he uses in choosing one pair of shoes over another," and teach that "the student must determine right and wrong based only on his own experience, feelings and [internal] values" and that "the validity of a moral choice is only to be decided by the student." The district court stated that "[t]he emphasis and overall approach implies, and would cause any reasonable thinking student to infer, that the book is teaching that moral choices are just a matter of preferences, because, as the books say, 'you are the most important person in your life.'" The district court stated that "[t]his highly relativistic and individualistic approach constitutes the promotion of a fundamental faith claim" that "assumes that self-actualization is the goal of every human being, that man has no supernatural attributes or component, that there are only temporal and physical consequences for man's actions, and that these results, alone, determine the morality of an action." According to the district court, "[t]his belief strikes at the heart of many theistic religions' beliefs that certain actions are in and of themselves immoral, *whatever the consequences*, and that, in addition, actions will have extra-temporal consequences." The district court stated that "some religious beliefs are so fundamental that the act of denying them will completely undermine that religion" and "[i]n addition, denial of *that* belief will result in the affirmance of a contrary belief and result in the establishment of an opposing religion." It concluded that, while the state may teach certain moral values, such as that lying is wrong, "if, in so doing it advances a reason for the rule, the possible different reasons must be explained evenhandedly" and "the state may not promote one particular reason over another in the public schools."

In order to violate the primary effect prong of the *Lemon* test through advancement of religion, it is not sufficient that the government action merely accommodates religion. The constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." Nor is it sufficient that government conduct confers an indirect, remote or incidental benefit on a religion, or that its effect merely happens to coincide or harmonize with the tenets of a religion:

> [T]he Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

In order for government conduct to constitute an impermissible advancement of religion, the government action must amount to an endorsement of religion. Further, the primary effect of challenged government action must be determined in light of the overall context in which it occurs: "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."

Examination of the contents of these textbooks, including the passages pointed out by Appellees as particularly offensive, in the context of the books as a whole and the undisputedly nonreligious purpose sought to be achieved by their use, reveals that the message conveyed is not one of endorsement of secular humanism or any religion. Rather, the message conveyed is one of a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making. This is an entirely appropriate secular effect. Indeed, one of the major objectives of public education is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system." It is true that the textbooks contain ideas that are consistent with secular humanism; the textbooks also contain ideas consistent with theistic religion. However, as discussed above, mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion.

Nor do these textbooks evidence an attitude antagonistic to theistic belief. The message conveyed by these textbooks with regard to theistic religion is one of neutrality: the textbooks neither endorse theistic religion as a system of belief, nor discredit it. Indeed, many of the books specifically acknowledge that religion is one source of moral values and none preclude that possibility. While the Supreme Court has recognized that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing, or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,'" that Court also has made it clear that neutrality mandated by the establishment clause does not itself equate with hostility towards religion. . . .

It is obvious that Appellees find some of the material in these textbooks offensive. That fact, however, is not sufficient to render use of this material in the public schools a violation of the establishment clause.* The district court erred in concluding that the challenged home economics books advanced secular humanism and inhibited theistic religion.

B. HISTORY AND SOCIAL STUDIES TEXTBOOKS

The district court's conclusion that the history and social studies textbooks violated the establishment clause was based on its finding that these books failed to include a sufficient discussion of the role of religion in history and culture. The district court found that the history books omit certain historical events with religious significance and "uniformly ignore the religious aspect of most American culture." The district court found that "[r]eligion, where treated at all, is generally represented as a private matter, only influencing American public life at some extraordinary moments," and that "[t]his view of religion is one humanists have been seeking to instill for fifty years." The district court concluded that the history books "assist that effort by perpetuating an inaccurate historical picture" and held that the books "lack so many facts as to equal ideological promotion." The district court also found that the history books "discriminate against the very concept of religion, and theistic religions in particular, by omissions so serious that a student learning history from them would not be apprised of relevant facts about America's history." Use of the social studies books was found unconstitutional because the books failed to integrate religion into the history of American society, ignored the importance of theistic religion as an influence in American society and contained "factual inaccuracies . . . so grave as to rise to a constitutional violation."

It is clear on the record of this case that, assuming one tenet of secular humanism is to downplay the importance of religion in history and in American society, any benefit to secular humanism from the failure of the challenged history and social studies books to contain references to the religious aspects of certain historical events or to adequately integrate the place of religion in modern American society is merely incidental. There is no doubt that these textbooks were chosen for the secular purpose of education in the areas of history and social studies, and we find that the primary effect of the use of these textbooks is consistent with that stated purpose. We do not believe that an objective observer could conclude from the mere omission of certain historical facts regarding religion or the absence of a more thorough discussion of its place in modern American society that the State of Alabama was conveying a message of approval of the religion of secular humanism. Indeed, the message that reasonably would be conveyed to students and others is that the education officials, in the exercise of their discretion over school curriculum, chose to use these particular textbooks because they deemed them more relevant to the curriculum, or better written, or for some other nonreligious reason found them to be best suited to their needs. . . .

Nor can we agree with the district court's conclusion that the omission of these facts causes the books to "discriminate against the very concept of religion." Just as use of these books does not convey a message of governmental approval of secular humanism, neither does it convey a message of government disapproval of theistic religions merely by omitting certain historical facts concerning them. . . .

There is no question in this case that the purpose behind using these particular history and social studies books was purely secular. Selecting a textbook that omits a particular topic for nonreligious reasons is significantly different from requiring the omission of material because it conflicts with a particular religious belief. Further, unlike the situation in *Epperson*, which involved total exclusion of information regarding evolution from the school curriculum, Appellees in this case merely complain that the historical treatment of religion in the challenged textbooks is inadequate. Finally, the record indicates that teachers in Alabama were free to supplement the discussion contained in the textbooks in areas they found inadequate. Thus, unlike the situation in *Epperson* where the State of Arkansas had made an attempt to teach the omitted material a criminal offense, there is no active policy on the part of Alabama that prohibits teaching historical facts about religion. There simply is nothing in this record to indicate that omission of certain facts regarding religion from these textbooks of itself constituted an advancement of secular humanism or an active hostility towards theistic religion prohibited by the establishment clause. While these textbooks may be inadequate from an educational standpoint, the wisdom of an educational policy or its efficiency from an educational point of view is not germane to the constitutional issue of whether that policy violates the establishment clause.

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*Indeed, given the diversity of religious views in this country, if the standard were merely inconsistency with the beliefs of a particular religion there would be very little that could be taught in the public schools. . . .

III. CONCLUSION

The home economics, social studies, and history textbooks at issue in this case do not violate the establishment clause of the first amendment. The district court's conclusions to the contrary reflect a misconception of the relationship between church and state mandated by the establishment clause. What is required of the states under the establishment clause is not "comprehensive identification of state with religion," but *separation* from religion. Yet implicit in the district court's opinion is the assumption that what the establishment clause actually requires is "equal time" for religion. Thus, the district court states that, while the state may teach certain moral values, it cannot advance any reason for those values unless "the possible different reasons [are] explained evenhandedly," and finds that history may not be taught constitutionally in the schools unless the textbooks contain more references to the place of religion in history.

"Separation is a requirement to abstain from fusing functions of Government and religious sects, not merely to treat them all equally." The public schools in this country are organized

> on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.

The district court's opinion in effect turns the establishment clause requirement of "lofty neutrality" on the part of the public schools into an affirmative obligation to speak about religion. Such a result clearly is inconsistent with the requirements of the establishment clause. . . .

Reversed and remanded with directions.

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Closely related to the issue raised in *Smith* is the question of whether it is permissible for schools to display images and symbols of fictional or hypothetical supernatural beings or to read materials concerning magic, fantasy, and the supernatural. Courts have uniformly rejected claims by parents that such activities as posting Halloween symbols at school, using a "Blue Devil" as a school mascot, and reading stories about witches and sorcerers were violations of the Establishment Clause.[48] Despite these rulings, some school boards and schools have adopted policies banning all mention of the supernatural in the classroom. Such a ban may be legally impermissible if its purpose is to make the curriculum consistent with religious beliefs.

Not all religious objections to school programs are based on the Establishment Clause. In *Mozert v. Hawkins County Board of Education*,[49] the Sixth Circuit considered a claim by students and parents that being forced to participate in programs designed to promote critical thinking, tolerance, and moral development and to read material that exposed them to ideas and values that contradicted their religious beliefs violated their right to free exercise of religion. Plaintiffs argued that the school had an obligation to provide their children with an alternative program consistent with their religious beliefs, but the court found that the plaintiffs had not shown that the school's programs and materials placed a burden on their religious practices or beliefs. Exposure to contrary views, explained the court, is not the same as compulsion to believe:

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[48] Kunsehnan v. Western Reserve Local Sch. Dist., 70 F.3d 931 (6th Cir. 1995); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994); Fleischfresser v. Director of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994); Guyer v. School Bd. of Alachua County, 634 So. 2d 806 (Fla. Dist. Ct. App. 1994).

[49] 827 F.2d 1058 (6th Cir. 1987).

> [The plaintiff testified] that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer. There is no evidence that any child in the Hawkins County schools was required to make such judgments. It was a goal of the school system to encourage this exercise, but nowhere was it shown that it was required. When asked to comment on a reading assignment, a student would be free to give the Biblical interpretation of the material or to interpret it from a different value base. The only conduct compelled by the defendants was reading and discussing the material in the [reading] series, and hearing other students' interpretations of those materials. This is the exposure to which the plaintiffs objected. What is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion. . . .

As *Mozert* indicates, courts are unlikely to grant religion-based exemptions to school programs designed to teach tolerance or other secular, community values.

Sex education has been a frequent target of religion-based parental objection. In *Cornwell v. State Board of Education*,[50] parents argued that a program of "family life and sex education" violated the Establishment Clause. The court disagreed: ". . . [T]he purpose and primary effect here is not to establish any particular religious dogma or precept, and the [program] does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion." Whereas the *Cornwell* plaintiffs sought complete elimination of sex education from the school program, other parents have tried to exempt only their own children. In *Valent v. New Jersey State Board of Education*,[51] the court rejected the argument that required instruction in sex education violated plaintiffs' free exercise rights.

A recent case involved an "AIDS awareness program" that included frank and graphic discussions of various sexual and other bodily functions and an emphasis on "safe sex" rather than abstinence. Parents objected both on free exercise grounds and on the grounds that exposing their children to the program without their permission violated their Fourteenth Amendment right to control their children's upbringing, but the court disagreed: "If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to create a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."[52]

Even condom distribution programs have survived claims that they violated parents' free exercise rights; however, parents have sometimes prevailed when they argued that condom distribution programs violated their right to direct the upbringing of their child or to be informed of the medical care offered to their child.[53]

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[50] 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970).

[51] 274 A.2d 832 (N.J. Sup. Ct. Ch. Div. 1971).

[52] Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995).

* * *

Is there any way to calculate the net effect of this body of cases? Do these opinions require that secular humanism be taught in the public schools? Do they eliminate all traces of the United States' religious heritage? The answer to the latter two questions is no. The judiciary's interpretation of the religion clauses of the Constitution bars both some aspects of religious belief and some aspects of secular humanism from the schools.

On the one hand, schools may not tailor their programs in accordance with religious beliefs, offer religious instruction or theistic moral training, or endorse the Bible as the only true source of knowledge. On the other hand, schools may not systematically purge the curriculum of all mention of religion or ideas that are consistent with religious belief, endorse atheism, or declare that science is the only real source of knowledge or that the Bible is not true. Thus, the Constitution excludes from the classroom both proreligion sentiments and the antireligion bias of some secular humanists.

Schools are free to teach the importance of critical thinking, reasoning, and the need for personal inquiry and choice. They may teach tolerance, open-mindedness, and receptivity to different cultures and values. Thus, although there is much of the secular humanist agenda that may be taught, schools are also free to teach much of the agenda of many traditional religious groups, such as patriotism, family values, and the duty to obey the law. Concerning sex education, the Constitution permits a range of choices: states may require schools to instruct their pupils in contraception and the prevention of AIDS, offer a program that discourages all extramarital sex, or teach that individuals must make their own choices in matters of sex. In the absence of state guidelines, local schools are free to adopt any of these options or sex education may be left entirely to the family.

Inevitably, some of what is taught in public schools will violate the personal and moral convictions of some parents. Parts of the public school curriculum will be consistent with the beliefs of some religions and parts will contradict religious doctrine. Parents have no constitutional right to insist that their children be exempt from participation in educational programs that are inconsistent with their personal or religious convictions; however, no curriculum may be selected because it agrees with or opposes any religious or antireligious belief.

3.5 FREE SPEECH AND RELATED OBJECTIONS TO PROGRAMS AND POLICIES

Although the religion clauses have been the primary basis for constitutional challenges to school programs, the First Amendment's guarantee of freedom of speech also has been the basis of several significant attacks. In these cases, the Free Speech Clause is used in an atypical way. Rather than assert a right to express their own ideas, plaintiffs claim either a right not to be forced to express ideas (i.e., a right not to speak) or they claim a right to be exposed to the ideas of others (i.e., a right to hear or to know). (See chap. 4 for a general discussion of the rights of students to express themselves and chap. 9 regarding the free speech rights of teachers.)

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[53] Curtis v. Falmouth Sch. Comm., 652 N.E.2d 580 (Mass. 1995); Alfonso v. Fernandez, 606 N.Y.S.2d 259 (App. Div. 1993).

THE RIGHT NOT TO SPEAK

In the *Pierce* case (see sec. 2.1), the Supreme Court affirmed the power of the state to ensure that, "studies plainly essential to good citizenship . . . be taught, and . . . nothing . . . manifestly inimical to the public welfare." In 1940, the Court applied this principle in upholding, against religious objection, a requirement that students salute the flag and recite the Pledge of Allegiance.[54] Only two years later, the Court reconsidered the same issue in *West Virginia State Board of Education v. Barnette*.[55]

Barnette was brought by a group of Jehovah's Witnesses who objected to a state law requiring students, under threat of expulsion from school and criminal prosecution, to recite the Pledge of Allegiance. Although the plaintiffs made their arguments on religious grounds, the Court based its ruling on freedom of speech. The Court noted that the state has every right to adopt a curriculum designed to "inspire patriotism and love of country" by such traditional educational methods as teaching about the constitutional guarantees of civil liberties. "Here, however," wrote the Court, "we are dealing with a compulsion of students to declare a belief. . . . To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." Moreover, the Court noted that, "the power of compulsion is invoked without any allegation that remaining passive during a flag ritual creates a clear and present danger. . . ." Thus concluded the Court, although the state's purpose in requiring a flag salute was valid, its methods overstepped constitutional bounds:

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word

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[54] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

[55] 319 U.S. 624 (1943).

> or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

This principle of freedom of thought and expression is so important, said the Court, that it has been given a special status outside of the democratic decision process:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of elections. . . .

Finally, the Court rejected the idea that because they are dealing with minor students, schools and educators should be exempt from the restrictions of the Bill of Rights: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Since *Barnette*, schools have been prohibited from insisting that students participate in flag salutes or other patriotic ceremonies. Students may not be forced to stand during the ceremony or to leave the room if they choose not to participate.[56] However, it continues to be permissible to include a flag salute in a school's daily program. Several courts have upheld school-sponsored recitation of the Pledge against the claim that its reference to God violates the Establishment Clause.[57]

Barnette has often been cited by the Supreme Court when prohibiting government practices that have the effect of forcing people to espouse a political belief, support a candidate, or display a political slogan against their will.[58] However, except for the prohibition against compelled recitation of the Pledge, the right not to speak has had little effect on the program of schools.

In a 1993 case, the Third Circuit Court rejected a claim based on *Barnette* that a school's program of compulsory community service required students to embrace and express a belief in the value of altruism. The court concluded that, "There is no basis in the record to support the argument that the students who participate in the program are obliged to express their belief, either orally or in writing, in the value of community service. Nor was evidence produced that people in the community would perceive their participation in the program as an intended expression of a particularized message of their belief in community service and altruism."[59] Community service requirements have also prevailed against the argument that they violate parents' rights to control the upbringing of their children and against the novel argument that they violate the Thirteenth Amendment's prohibition of involuntary servitude.[60]

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[56] Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Banks v. Bd. of Pub. Instruction of Dade County, 450 F.2d 1103 (5th Cir. 1971).

[57] Sherman v. Community Consol. Sch. Dist. 21, 758 F. Supp. 1244 (N.D. Ill. 1991), *modified*, 980 F.2d 437 (7th Cir. 1992); Smith v. Denny, 280 F. Supp. 651 (E.D. Cal. 1968), *appeal dismissed*, 417 F.2d 614 (9th Cir. 1969).

[58] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977).

[59] Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989 (3d Cir. 1993).

Arguably, *Barnette* might prohibit teachers from insisting that students give "ideologically correct" answers on an examination. Students might object to payment of a fee used to support a newspaper or speakers whose politics they oppose. Although neither of these issues has been litigated in the context of public schools, similar cases involving public colleges suggest that the latter argument might succeed.[61]

Thus, despite *Barnette*, schools remain free to promote patriotic beliefs and community values. Nothing in the Constitution prohibits schools from urging students to support the country or its policies; however, students must not be required or coerced to say that they will do so.

THE RIGHT TO HEAR

Courts have taken a variety of positions on whether and to what extent the Constitution places limits on the school board's authority to reject or eliminate books and other materials from the curriculum or school library. A California court avoided reaching a constitutional decision by ruling that the local school board did not have statutorily delegated authority to remove books it judged socially unacceptable. The board was, however, found to have authority to remove books judged obscene for minors.[62] In *President's Council v. Community School Board, No. 25*,[63] the Second Circuit found that removal from the school library of a book judged "offensive" by the school board raised no substantial constitutional issue. The court reasoned that removal of books was an academic decision and that, although it was sure to be controversial at times, the judiciary should avoid "intrusion . . . into the internal affairs of school." However, in *Minarcini v. Strongsville City School District*,[64] the Sixth Circuit found that the students' First Amendment "right to know" prohibited removal of books based on the "social and political tastes of school board members."

In *Zykan v. Warsaw Community School Corp.*,[65] the Seventh Circuit developed a set of guidelines for determining whether a school board's removal of curricular materials overstepped constitutional bounds. The court found that although school boards generally enjoy wide latitude to determine what material may be used in their schools, they may not "substitute a rigid and exclusive indoctrination for the mere existence of their prerogative to make pedagogic choices regarding matters of legitimate dispute," impose "religious or scientific orthodoxy or . . . a desire to eliminate a particular kind of inquiry generally," or "exclude a particular type of thought, or even . . . some identifiable ideological preference."

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[60] Herndon v. Chapel Hill-Carrboro, 89 F. 3d 174 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997); Immediato v. Gironda, 73 F.3d 454 (2d Cir. 1996).

[61] Uzzell v. Friday, 547 F.2d 801 (4th Cir. 1977); Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985).

[62] Wexner v. Anderson Union High Sch. Dist. Bd. of Trustees, 258 Cal. Rptr. 26 (Ct. App. 1989).

[63] 457 F.2d 289 (2d Cir. 1972).

[64] 541 F.2d 577 (6th Cir. 1976).

[65] 631 F.2d 1300 (7th Cir. 1980).

In 1981, the Supreme Court addressed the issue of a school board's censorship of library books in *Board of Education v. Pico.*[66] The case was brought by a group of students who claimed that their free speech rights were violated when the school board, at the urging of a politically conservative lobbying organization, ordered nine books removed from the school library. Although a committee convened by the board to consider the matter had recommended retaining most of the books, the school board justified its actions by declaring that the books were, "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."

Pico produced no majority opinion. Although five of the nine justices agreed that the Constitution placed some limits on a school board's authority to remove books from its schools' libraries, they could not agree on an appropriate test for determining those limitations. The plurality opinion sought to balance the authority of the school board to attempt to prepare students for adult citizenship by inculcating them with democratic values with the students' right to receive ideas. The right to receive ideas, said the opinion, "follows ineluctably from the *sender's* First Amendment right to send them." The plurality emphasized that unlike participation in the classroom curriculum, use of the library was completely voluntary and offered the students an opportunity for self-education and individual enrichment. Whereas the plurality felt that the library's unique role required tolerating a broader spectrum of opinion than was necessary in other aspects of the curriculum, the dissenting justices believed that the school board should be free to remove books that conflicted with their social, political, or moral views from any aspect of the school's program including the library.

The Court's plurality opinion advocated a motivational test: (Recall that plurality opinions do not create precedent as majority opinions of the Supreme Court do.)

> [School authorities] rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly conceded that an unconstitutional motivation would not be demonstrated if it

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[66] 457 U.S. 853 (1981).

> were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. And again, respondents conceded that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.
>
> As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books. In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Such purposes stand inescapably condemned by our precedents.

In addition to its failure to establish precedent, the usefulness of *Pico* is limited by the plurality's insistence that its reasoning applied only to removal of books from the school library and not to the purchase of books or removal of classroom materials. Furthermore, recent decisions on related matters suggest that today's Supreme Court has moved closer to the position of the *Pico* dissenters: school boards enjoy broader discretion in controlling all aspects of the curriculum than the *Pico* plurality would have allowed (see discussion of *Hazelwood School District v. Kuhlmeier* in sec. 4.3). This approach is reflected in the following case.

VIRGIL v. SCHOOL BOARD OF COLUMBIA COUNTY

United States Court of Appeals for the Eleventh Circuit, 1989
862 F.2d 1517

Anderson, Circuit Judge:

This case presents the question of whether the first amendment prevents a school board from removing a previously approved textbook from an elective high school class because of objections to the material's vulgarity and sexual explicitness. We conclude that a school board may, without contravening constitutional limits, take such action where, as here, its methods are "reasonably related to legitimate pedagogical concerns." Accordingly, we affirm the judgment of the district court.

I. FACTS

The essential facts were stipulated by the parties to this dispute. Since about 1975 the educational curriculum at Columbia High School has included a course entitled "Humanities to 1500" offered as part of a two-semester survey of Western thought, art and literature. In 1985 the school designed the course for eleventh- and twelfth-grade students and prescribed as a textbook Volume I of *The Humanities: Cultural Roots and Continuities*. This book contained both required and optional readings for the course.

Among the selections included in Volume I of *Humanities* which were neither required nor assigned are English translations of *Lysistrata*, written by the Greek dramatist Aristophanes in approximately 411 B.C., and *The Miller's Tale*, written by the English poet Geoffrey Chaucer around 1380–1390 A.D. During the fall semester of the 1985–86 school year, a portion of *Lysistrata* was read aloud in class during a session of the Humanities course.

In the spring of 1986, after the first semester had ended, the Reverend and Mrs. Fritz M. Fountain, the parents of a student who had taken the class in the fall of 1985, filed a formal complaint concerning Volume I of Humanities with the School Board of Columbia County. The Fountains also submitted a Request for Examination of School Media. Their objections centered upon *Lysistrata* and *The Miller's Tale*.

In response to this parental complaint, the School Board on April 8, 1986 adopted a Policy on Challenged State Adopted Textbooks to address any complaints regarding books in use in the curriculum. Pursuant to the new policy, the School Board appointed an advisory committee to review Volume I of *Humanities*. Upon examination, the committee recommended that the textbook be retained in the curriculum, but that *Lysistrata* and *The Miller's Tale* not be assigned as required reading.

At its April 22, 1986 meeting the School Board considered the advisory committee's report. Silas Pittman, Superintendent of the Columbia County School System, offered his disagreement with the committee's conclusion, and recommended that the two disputed selections be deleted from Volume I or that use of the book in the curriculum be terminated. Adopting the latter proposal, the School Board voted to discontinue any future use of Volume I in the curriculum.

Pursuant to the Board decision, Volume I of *Humanities* was placed in locked storage and has been kept there ever since. Volume II was used as the course textbook for the rest of the second semester of the 1985–86 academic year, as well as for both semesters of the "Humanities" course during the 1986–87 term. Since the Board's removal decision, both Volumes I and II have been available in the school library for student use, along with other adaptations and translations of *Lysistrata* and *The Miller's Tale*.

On November 24, 1986 parents of students at Columbia High School filed an action against the School Board and the Superintendent seeking an injunction against the textbook removal and a declaration that such action violated their first amendment rights. . . .

The district court found that the two principal factors giving rise to the School Board's decision were "the sexuality in the two selections" and their "excessively vulgar . . . language and subject matter." In the court's view, the other reasons stipulated by the Board members "simply amplify why they believed that vulgar and sexually explicit materials could properly be removed from the curriculum." The court acknowledged that "the School Board's decision reflects its own restrictive views of the appropriate values to which Columbia High School students should be exposed," and expressed the difficulty it had in "apprehend[ing] the harm which could conceivably be caused to a group of eleventh- and twelfth-grade students by exposure to Aristophanes and Chaucer." Nonetheless, the court held that the deferential standards recently established in *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988), had been met, as the removal decision was "reasonably related" to the "legitimate pedagogical concern" of denying students access to "potentially sensitive topics" such as sexuality.

On February 19, 1988 plaintiffs-appellants filed notice of appeal to this court.

II. DISCUSSION

It has long been clear that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." At the same time, the Supreme Court has held that the rights of students in public schools are not automatically coextensive with the rights of adults and has recognized the central role of public schools in transmitting values necessary to the development of an informed citizenry. . . .

In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity. . . .

The most direct guidance from the Supreme Court is found in the recent case of *Hazelwood School District v. Kuhlmeier* (1988). In *Hazelwood* the Court upheld the authority of a high school principal to excise two pages from a school-sponsored student newspaper on the grounds that articles concerning teenage pregnancy and divorce were inappropriate for the level of maturity of the intended readers, the privacy interests of the articles' subjects were insufficiently protected, and the controversial views contained therein might erroneously be attributed to the school. *Hazelwood* established a relatively lenient test for regulation of expression which "may fairly be characterized as part of the school curriculum." Such regulation is permissible so long as it is "reasonably related to legitimate pedagogical concerns."

In applying that test the Supreme Court identified one such legitimate concern which is relevant to this case: "a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics . . . [e.g.] the particulars of teenage sexual activity." *See also Bethel School District v. Fraser*, 478 U.S. 675, 683, (1986) (recognizing interest in protecting minors from exposure to "sexually explicit" speech and "vulgar" or "offensive" spoken language); *Pico*, 457 U.S. at 871 (plurality opinion) (removal of books from library would be permissible if decision were based on determination that books were "pervasively vulgar" or not "educational[ly] suitab[le]"); *id.*

at 880, (Blackmun, J., concurring in part and concurring in judgment) (removal permissible if motivated by concern that material "contains offensive language . . . or because it is psychologically or intellectually inappropriate for the age group").

In applying the *Hazelwood* standard to the instant case, two considerations are particularly significant. First, we conclude that the Board decisions at issue were curricular decisions. The materials removed were part of the textbook used in a regularly scheduled course of study in the school. Plaintiffs argue that this particular course was an elective course, and not a required course. However, common sense indicates that the overall curriculum offered by a school includes not only the core curriculum (i.e., required courses) but also such additional, elective courses of study that school officials design and offer. Each student is expected to select from the several elective courses which school officials deem appropriate in order to fashion a curriculum tailored to his individual needs.

One factor identified in *Hazelwood* as relevant to the determination of whether an activity could fairly be characterized as part of the curriculum is whether "the public might reasonably perceive [the activity] to bear the imprimatur of the school." It is clear that elective courses designed and offered by the school would be so perceived. Moreover, we can take judicial notice that the journalism class which was considered in *Hazelwood* itself to be part of the curriculum was surely an elective course.

Plaintiffs further point out that the materials removed in this case not only were part of an elective course, but were optional, not required readings. For the reasons just mentioned, we conclude that the optional readings removed in this case were part of the school curriculum. Just as elective courses are designed by school officials to supplement required courses, optional readings in a particular class are carefully selected by the teacher as relevant and appropriate to supplement required readings in order to further the educational goals of the course. This is especially true in the instant circumstances, where the optional readings were included within the text itself, and thus had to accompany the student every time the text was taken home. Such materials would obviously carry the imprimatur of school approval.

The second consideration that is significant in applying the *Hazelwood* standard to this case is the fact that the motivation for the Board's removal of the readings has been stipulated to be related to the explicit sexuality and excessively vulgar language in the selections. It is clear from *Hazelwood* and other cases that this is a legitimate concern. School officials can "take into account the emotional maturity of the intended audience in determining . . . [the appropriateness of] potentially sensitive topics" such as sex and vulgarity.

Since the stipulated motivation of the School Board relates to legitimate concerns, we need only determine whether the Board action was *reasonably* related thereto. It is of course true, as plaintiffs so forcefully point out, that *Lysistrata* and *The Miller's Tale* are widely acclaimed masterpieces of Western literature. However, after careful consideration, we cannot conclude that the school board's actions were not reasonably related to its legitimate concerns regarding the appropriateness (for this high school audience) of the sexuality and vulgarity in these works. Notwithstanding their status as literary classics, *Lysistrata* and *The Miller's Tale* contain passages of exceptional sexual explicitness, as numerous commentators have noted. In assessing the reasonableness of the Board's action, we also take into consideration the fact that most of the high school students involved ranged in age from fifteen to just over eighteen, and a substantial number had not yet reached the age of majority. We also note that the disputed materials have not been banned from the school. The *Humanities* textbook and other adaptations of *Lysistrata* and *The Miller's Tale* are available in the school library. No student or teacher is prohibited from assigning or reading these works or discussing the themes contained therein in class or on school property, *Cf. Sheck v. Baileyville School Committee*, 530 F. Supp. 679 (D. Maine 1982) (granting preliminary injunction against school banning of book from library for its "objectionable" language, where ban extended to mere possession of work anywhere on school property, including school buses). Under all the circumstances of this case, we cannot conclude that the Board's action was not reasonably related to the stated legitimate concern.

We decide today only that the Board's removal of these works from the curriculum did not violate the Constitution. Of course, we do not endorse the Board's decision. Like the district court, we seriously question how young persons just below the age of majority can be harmed by these masterpieces of Western literature. However, having concluded that there is no constitutional violation, our role is not to second guess the wisdom of the Board's action.

The judgment of the district court is affirmed.

* * *

Whether the *Virgil* court would have ruled the same way if the school board had removed the books because it disagreed with their political and social viewpoints (e.g., the antiwar message of *Lysistrata*) is not clear. School boards undoubtedly have broad leeway to control all aspects of their curricula as long as they act on the basis of legitimate pedagological concerns. In particular, all courts seem to agree with *Virgil* that books judged obscene, vulgar, or sexually offensive may be removed from the classroom or library. Likewise, the prohibition of school theatrical productions considered vulgar or age-inappropriate has generally been allowed.[67] However, no court has yet rejected the *Pico* plurality's view that, "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to these books." In fact, even the main dissenting opinion in *Pico*, written by now Chief Justice Rendquist, affirmed this dictum.

A few courts have imposed procedural due process requirements on school boards desiring to censor books. One court said the board could remove books from the library only by following preestablished, nonvague guidelines.[68] Another court ruled that the Due Process Clause of the Fourteenth Amendment was violated when the board failed to follow its own procedures for the removal of books.[69] However, not all courts concur in these judgments.[70] Whether constitutionally required or not, the establishment of and adherence to a definite set of procedures for dealing with requests to censor books seems a sound policy.

The arrival of the Internet in schools and the desire of educators to regulate their students' exposure to certain types of materials on the World Wide Web have the potential to raise new legal problems. The decision of whether to have Internet access in a school is analogous to the decision of whether to have a library. In the absence of controlling state regulations, the decision would be within the authority of local school boards. The decision of whether to install software designed to block certain types of Web sites is analogous to the decision of whether to pursue a policy of not purchasing a certain type of book for the school library. As long as the blocking software was installed to advance a legitimate pedagogical concern (e.g., to shield students from age-inappropriate or pervasively vulgar materials) the school would be within its authority. If, however, the purpose of the limitation was to prevent students from being exposed to certain categories of ideas, the school's authority would be questionable. Ordering students not to access certain types of sites is analogous to telling them not to look at some of the books found on the shelves of the school library. Leaving aside the question of whether such a policy is likely to be effective, rules of this kind (e.g., ordering students to avoid "inappropriate," "indecent," or "offensive" sites) are vulnerable to claims that they are unconstitutionally vague and overbroad[71] (see sec. 5.1 on the making and enforcement of rules). On the other hand, permitting unregulated access to the Internet is analogous to maintaining a library containing everything that anyone wishes to put in it and might leave schools vulnerable to lawsuits alleging that a student was harmed by viewing sexually explicit or racially biased material.

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[67] Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981); Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986); *but see*, Bowman v. Bethel-Tate Bd. of Educ., 610 F. Supp. 577 (S.D. Ohio 1985).

[68] Sheck v. Baileyville Sch. Comm., 530 F. Supp. 679 (D. Me. 1982).

[69] Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

[70] Bicknell v. Vergennes Union High Sch. Bd. of Dir., 638 F.2d 438 (2d Cir. 1980).

3.6 OBJECTIONS TO DISCRIMINATORY MATERIAL

Only a few courts have dealt with claims that methods of curriculum development, materials selection, or a curriculum itself violates the Equal Protection Clause by being racially or sexually biased. In *Loewen v. Turnipseed*,[72] plaintiffs challenged the book selection policy of a statewide textbook commission. Although it had authority to approve up to five books, the commission selected only one, *Your Mississippi*, for use in a required state history course. The authors and publishers of a competing book, *Mississippi: Conflict and Change*, together with parents, students, and local officials, charged that the approved book deprecated Blacks and championed White supremacy and that the commission had acted for racial reasons. The district court agreed that the rating process had been racially motivated. The vote was split along racial lines, with the commission's five White members refusing to rate *Conflict and Change* despite its having received favorable reviews and the two Black members supporting its adoption. Comments of the White members also indicated that they opposed *Conflict and Change* for racial reasons. The court ordered that both books be listed as approved and eligible for adoption by local school districts.

The *Loewen* court avoided confronting the most difficult issues that could arise in this kind of case: whether a particular book or course is itself racially, sexually, or ethically biased and, if so, whether public schools are prohibited by the Constitution from offering a curriculum biased against a racial or gender group. It is far from clear what standards would govern these issues. Take, for example, Mark Twain's classic novel, *Huckleberry Finn* with its repeated use of the term "nigger." Is it a candidate for judicial censure on the ground that the use of such a term in public schools carries a message of racial inferiority in violation of the Equal Protection Clause? Consider another example: the portrayal of Shylock in William Shakespeare's *The Merchant of Venice*. The use of this play and Charles Dickens' novel *Oliver Twist* was in fact the subject of a legal challenge on the ground that these books projected an invidious image of Jews.[73] In a nonconstitutional decision, the court ruled that the play and book could be used because there was no evidence that the authors' intentions were antisemitic. Would the court have banned the works if antisemitic intentions had been discovered?

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[71] *See*, Reno v. ACLU, 521 U.S. 844 (1997).

[72] 488 F. Supp. 1138 (N.D. Miss. 1980).

[73] Rosenberg v. Board of Educ. of N.Y., 92 N.Y.S.2d 344 (App. Div. 1949).

What of books and plays that have a single male hero—are they discriminatory toward women? Or what of history books that omit references to Native Americans? What of Black literature critical of Whites and feminist writings critical of males—are these to be banned on the ground that they discriminate against one group or another? It is doubtful that courts will address these concerns except perhaps in the most blatant cases. One court has ruled that a school's use of materials expressing a racially biased point of view does not violate either the Equal Protection Clause of the Constitution or Title VI of the Civil Rights Act of 1964 unless done with an intent to discriminate.[74]

In the absence of judicial guidelines, the responsibility for the provision of an unbiased and sound curriculum rests with state and local education decision makers. For example, because in all likelihood courts will neither prohibit the use of *Huckleberry Finn* nor block its removal from the school, education officials are faced with the choice of requiring students to read the book, making it available to those who want it without requiring it, or not even having it available. Although neither the law nor education theory mandates a particular course of action, this and all other curricular decisions should be made after reflective deliberations on the literary, social, and historical significance of the books, materials, and topics under consideration and not in panicked response to the demands of small groups of parents, students, or patrons.

3.7 FEDERAL STATUTORY RESTRICTIONS ON SCHOOL PROGRAMS

Several federal laws regulate the education that states and school districts must provide to disabled children and those with limited English proficiency. These laws are examined in detail in chapter 7.

Three additional federal statutes bear directly on the school's authority to control its own program and materials: the Copyright Act, the Equal Access Act, and the Hatch Amendment.

THE COPYRIGHT ACT

The Copyright Act of 1976[75] is of particular importance to educators because it regulates the duplication of materials for classroom use. A copyright gives its owner a property interest in the copyrighted materials in much the same way one might own a house or a car. A copyright owner enjoys a set of "exclusive rights," including the right to reproduce the work, to sell copies, and to perform or display the work publicly. Thus, the excessive duplication of copyrighted materials without permission can violate the law. However, under certain circumstances, the law does allow teachers to make copies of copyrighted materials for classroom use. The circumstances under which duplication is permitted are known as "fair use."

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[74] Grimes v. Cavazos, 786 F. Supp. 1184 (S.D.N.Y. 1992).

[75] 17 U.S.C. §§101-1101.

The Copyright Act states that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." To determine whether the use in any particular case is fair, four factors are considered:

1. The "purpose" and character of the use, including whether such use is of a "commercial nature" or is "for nonprofit educational purposes." Copying for commercial purposes is more strictly controlled than copying for educational purposes.
2. The "nature" of the copyrighted work. Certain types of materials such as newspaper articles and materials that are out of print lend themselves to fair use duplicating.
3. The "amount and substantiality of the portion used" in relation to the work as a whole. The more one takes from the copyrighted material and the more closely the taken portion represents the heart of the work, the greater the likelihood of copyright infringement. (This factor is discussed further below.)
4. The effect of the use upon the "potential market for or value of" the copyrighted material.

In order to clarify these factors, a congressional committee has developed additional guidelines that, although not binding, have been taken into account by the courts.[76] These guidelines state that, for research or teaching purposes, teachers may make **single** copies of a chapter from a book, an article from a periodical or newspaper, a short story, short essay, or short poem, a chart, graph, diagram, or cartoon. A teacher may make **multiple** copies for classroom use if the copying meets the tests for brevity, spontaneity, and cumulative effect.

"Brevity" is defined to mean 250 words of a poem or not more than two pages of poetry; a complete article, story, or essay of fewer than 2,500 words; an excerpt of ten percent of a work or 1,000 words; or one graph or one cartoon. Copying is "spontaneous" when done at the inspiration of an individual teacher and when it occurs so close in time to the use of the work that it would be unreasonable to expect the teacher to obtain permission to copy. The "cumulative effect" limitation is violated if the copying is for more than one course in the school; more than one poem, story, or article or two excerpts are copied from the same author; more than three items are taken from a collective work or periodical volume during one class term; or if a teacher uses multiple copies more than nine times in one course during one class term.

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[76] Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983).

All copying of copyrighted material must also conform to the following rules: (a) copies may not be used to create anthologies or other collective works; (b) consumable materials such as workbooks, tests, and answer sheets may not be copied; (c) copying may not be substituted for purchasing, be "directed by higher authority," or be repeated with the same item by the same teacher from term to term; (d) students may only be charged for the actual costs of duplication; and (e) each copy must include a notice of copyright.

An additional set of guidelines applies to the copying of music. Music may be copied to replace purchased copies that are not immediately available for an imminent performance provided that purchased copies are substituted in due course. For academic purposes other than a performance, it is permissible to make one copy per student consisting of up to ten percent of a whole work, provided the copied portion does not constitute a "performable unit." A teacher may make a single copy of a sound recording for the purpose of constructing aural exercises or examinations. A single copy of a performance of copyrighted materials by students may be made for evaluation or rehearsal purposes. Finally, purchased or printed copies may be edited or simplified as long as the fundamental character of the work is not distorted or any lyrics altered or added.

THE EQUAL ACCESS ACT

The Equal Access Act (EAA)[77] states in part that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

EAA has several important limitations. It applies only to student groups, not to teachers, patrons, or even groups with both student and outside members. The Act applies only to secondary schools and does not require schools to permit student-initiated groups to meet on campus. It does not supplant the school's authority to decide when and where student clubs may meet. However, if a school decides to establish a "limited open forum" (i.e., if it voluntarily chooses to permit any noncurricular student-initiated group to meet on campus) then it must afford equal opportunity to all nondisruptive, lawful student groups. In *Board of Education of the Westside Community Schools v. Mergens*,[78] the Supreme Court defined "noncurriculum related student group" to mean:

> any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught,

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[77] 20 U.S.C. § 4071.
[78] 496 U.S. 226 (1990).

> in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.
>
> For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act's obligations.
>
> On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech. Whether a specific student group is a "noncurriculum related student group" will therefore depend on a particular school's curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make.

Based on this definition, the Court ruled that denial of recognition to a student-initiated "Christian Club" by a school that recognized a variety of other noncurriculum-related student groups violated the EAA. The Court also rejected the contention that the Act itself violates the Establishment Clause.

In *Hsu v. Roslyn Union Free School District No. 3*,[79] the Second Circuit ruled that a school district violated the EAA when it refused to recognize a religious club because the constitution of that club specified that the club's officers must be Christians. The school district had denied recognition based on its nondiscrimination policy that prohibited excluding students from extracurricular activities based on religion, among other factors. But the court concluded that the club's decision to allow only Christians to fill three officer positions was calculated to make a certain type of speech possible at the club meetings and thus to realize the rights protected by the EAA.

In another recent case, the Ninth Circuit ruled that a school district created a limited open forum as defined by the EAA when it let a variety of voluntary, noncurriculum-related student groups use school facilities for meetings during the lunch hour. As a result, the school also had to permit a religious club the opportunity to meet during lunch.[80] (See sec. 4.2 and 4.5 on related constitutional issues.)

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[79] 85 F.3d 839 (2nd Cir. 1996).

[80] Ceniceros v. Board of Trustees of San Diego Unified Sch. Dist., 106 F.3d 878 (9th Cir. 1997).

THE HATCH AMENDMENT

The Hatch Amendment[81] has two main provisions. The first requires that all instructional materials used by schools in connection with research or experimentation be available for parental inspection. The second prohibits subjecting any student to psychiatric or psychological testing or treatment when the primary purpose is to obtain information concerning such matters as political affiliation, psychological problems, sexual behavior or attitudes, or illegal, antisocial, self-incriminating, or demeaning behavior. A school's failure to comply with the law could result in the loss of federal funds. The law contains many undefined terms that make its interpretation difficult, but as a practical matter it seems to have little effect on schools.

3.8 SUMMARY

The state has far greater power over the program of public schools than private schools. It is only a slight oversimplification to say that whereas the state needs a legally very good reason to dictate a curriculum to private schools, it can impose any requirement it wants on public schools unless there is a legally very good reason otherwise. In practice, the states have chosen to delegate some of their power over curriculum to local school boards. To some extent, the federal government has also become involved, mostly through categorical aid programs and restrictions attached to federal funds. Thus, decisions concerning standards, graduation requirements, mandated subjects, course content and perspectives, instructional methods, and materials are made through a complex process involving multiple levels of government.

Most challenges to state and local school board authority over the public school program are based on the religion clauses of the First Amendment. These cases are of two types. In one type, the plaintiffs rely on the Establishment Clause to object to organized prayers, Bible readings, moments of silence, dissemination of religious writings, and religious ceremonies in school. Many of these plaintiffs have succeeded. Using the *Lemon* test, courts prohibit the provision of any program whose purpose or primary effect is religious rather than secular.

In the second type of case, the plaintiffs object to course content or materials alleged to inhibit or advance religion. Some of these plaintiffs have won, as when the Supreme Court nullified an Arkansas law prohibiting the teaching of evolution. The Court found that the law's only purpose was to prevent the teaching of a scientific theory that contradicted fundamentalist Christian belief. However, most Establishment-Clause objections to course content and materials have failed. Mere agreement or disagreement of a curriculum with the teachings of any particular religion or with religion in general is not an Establishment Clause violation as long as the curriculum has a secular purpose. In particular, plaintiffs arguing that curricula devoid of religious content, failing to mention God, or contradict religious teachings establish a religion of secularism or secular humanism have not been successful. Similarly, when plaintiffs have claimed a free-exercise-based right not to be exposed to teachings that contradict their religious beliefs or their moral convictions, courts have generally rejected their claims.

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[81] 20 U.S.C.A. § 1232h.

Two types of free speech objections have been brought against school programs. In one, the plaintiffs claim a right not to be forced to espouse a political view against their will. The main application of this principle within the context of the public school is to prohibit requiring students to participate in a flag salute ceremony. The same principle might also prohibit requiring ideologically correct responses on an assignment or exam. The second type of free speech case is based on an alleged right to hear or to know. Most of these cases involve objections by student plaintiffs to school board decisions to remove books from the classroom or school library. Some library cases succeed when the court finds that the board's only motivation is a desire to suppress a disfavored political idea or theory. In general, however, courts give school boards broad latitude in selecting and discarding curricular materials, especially those judged obscene, vulgar, sexually offensive, or age inappropriate. Some courts do require that decisions to censor books be reached by applying preexisting, nonvague procedures. Schools' regulation of Internet use by their students is an emerging area of law.

A final type of constitutional objection to school programs involves courses or materials alleged to discriminate against one or more racial, ethnic, or gender groups. Little case law exists in this area and courts are not likely to get involved in any but the most blatant cases, such as when biased materials are used with an intent to discriminate against a racial or ethnic minority. In general, decisions concerning the political and social perspectives of the curriculum are more issues of educational policy than law.

CHAPTER 4

STUDENT FREE SPEECH RIGHTS

Chapters 4 and 5 consider legal issues relating to the school's control of student conduct. A theme that runs through both chapters is the tension between the school's need to maintain an orderly environment and students' rights as citizens and human beings. Specifically, this chapter examines the extent and limitations of students' constitutional right to freedom of expression in light of the school's need to maintain order and execute its mission. Chapter 5 considers the school's proper response when students misbehave.

In the not-too-distant past, the school's authority over its students was subject to few limitations. Courts commonly viewed the school as operating in the place of parents (in loco parentis), a doctrine that justified all manner of regulation, just as true parenthood confers broad powers. Until relatively recently, children, much less students, did not enjoy the protections of the Bill of Rights and the Fourteenth Amendment except in a few specialized contexts. Accordingly, only statute and common law restrained the authority of educators. Law relating to student behavior was scant, dealt primarily with the type and severity of permissible punishment, and allowed educators to decide what acts could be prohibited.

Thus, a popular education law textbook published by Madaline Remmlein in 1962 devotes only 10 of its 346 pages to issues relating to the control of student conduct.[1] It notes that, "[p]upils have the responsibility of obeying the school laws and rules and regulations of the state and local governing officials," and "the duty of submitting to orders of their teachers and other school authorities." Only two limitations on the school's authority are discussed: Statutory and common law are said to limit the severity of corporal punishment, and expulsions are supposed to be based on rules that are reasonable, although no case law findings against unreasonable school rules are presented. With the exception of the Supreme Court's ban against a required flag salute in *West Virginia State Board of Education v. Barnette* (see sec. 3.5), Remmlein mentions no constitutional limitations on the school's authority over its pupils.

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[1] Madaline Remmlein, School Law (2d ed. 1962).

Although Remmlein's treatment of this topic was complete for its time, two developments of the past four decades render it outdated. First, courts have recognized that, although children's legal status is not identical to adults', a child is nevertheless entitled to constitutional protection.[2] The state is now expected to provide strong justification for the differential treatment of children, particularly where fundamental rights are involved. Second, the doctrine of in loco parentis has been largely abandoned. Courts have come to realize that for most purposes it is more appropriate to view the school as an arm of the state rather than as a substitute parent. Therefore, courts are willing to extend the protection of the Bill of Rights and Fourteenth Amendment to students.

This does not mean that schools no longer have the authority (and duty) to control their pupils. On the contrary, the basic premise of Remmlein's chapter still holds: Students have a responsibility to obey the law, school rules, and the commands of their teachers. However, for its part, the school must be governed by the limitations that the law places on state regulation of its citizens. The school is expected to afford its pupils the full protection of their constitutional rights as defined by the courts.

4.1 FREEDOM OF EXPRESSION: AN OVERVIEW

The clauses of the First Amendment that deal with freedom of expression state: "Congress shall make no law . . . abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." As already discussed, these limitations apply to the actions of state government by virtue of the Due Process Clause of the Fourteenth Amendment.

Freedom of expression is a cornerstone of personal freedom and democracy. Four major themes emerge from among the many reasons given by courts and political theorists for its steadfast protection:

1. Freedom of expression is essential to effective operation of a system of self-government. People are unlikely to reach reasoned decisions unless they are free to debate the issues confronting them.
2. Without freedom of expression, uncovering and challenging false ideas would be impossible, thereby drastically reducing the possibility of learning the truth and impeding personal and political improvement.
3. Freedom of expression fosters self-realization and achievement.
4. Freedom of expression operates as a social and political safety valve permitting people to let off steam without resorting to violence.

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[2] *In re* Gault, 387 U.S. 1 (1967).

Courts typically extend broad-based, vigorous protection to freedom of speech. At the same time, they recognize that no right can be absolute. Some forms of speech are so damaging that to protect them would do more harm than good. Probably the best known example is that the state may outlaw crying "fire" in a crowded theater when there is no fire because of the tremendous potential for harm to people and property. Thus, in interpreting the freedom of expression clauses, the courts have developed extensive doctrine designed to protect both the essential values behind the First Amendment and those other legitimate interests that speech can damage. Drawing the appropriate lines has produced an extensive body of cases involving a complex set of definitions, tests, and rules.

DEFINITION OF "SPEECH"

Almost any action can be considered to have some expressive content. But, because the First Amendment specifically prohibits government action that abridges the freedom of "speech," many cases raise the issue of whether a particular expressive act falls into the category of speech. For example, punching someone in the nose can certainly be seen as a form of expression, but is it speech? Under most if not all circumstances, the answer would be no, so government regulation of nose punching—although arguably subject to other constitutional restraints—is not subject to the restraints imposed by the First Amendment.

Drawing the line between speech and other forms of expressive conduct is not always so easy. For example, is sleeping in a park speech? In one case involving people sleeping in a park as part of a demonstration to protest the plight of the homeless, the Supreme Court said that it was.[3] Similarly, the Court has declared that flag burning in conjunction with a political demonstration is a speech act, the regulation of which must conform to strictures of the First Amendment.[4] The Court wrote: "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether, '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " This then is the test for determining if a specific act is speech for First Amendment purposes.

Schools' desire to regulate the appearance of their students often raises the issue of whether hairstyles or clothing constitute speech for First Amendment purposes. Some courts have accepted the contention that a student's hairstyle is speech, but others have disagreed.[5] As for clothing, courts usually do not consider a general style of dress or the selection of a type of apparel or adornment to be speech. Thus, one court ruled that the wearing of an earring in one ear was not speech even though the students wore the earring as a gang symbol, and another court ruled that wearing sagging pants was not speech although it too indicated gang affiliation.[6] On the other hand, garments that have messages or logos printed on them or symbols affixed to them generally are considered speech.[7]

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[3] Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

[4] Texas v. Johnson, 491 U.S. 397 (1989).

[5] Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Gfell v. Rickelman. 441 F.2d 444 (6th Cir. 1971).

CATEGORIES OF SPEECH

Not all speech acts receive the same level of First Amendment protection. Obscenity, fighting words, and defamation of private citizens are not protected by the First Amendment. In this context, obscenity is a publication that meets three conditions: (a) the average person applying contemporary community standards would find that, taken as a whole, it appeals to prurient interests; (b) the publication depicts or describes in a patently offensive way sexual conduct specifically defined in state law; and (c) taken as a whole, the work lacks serious literary, artistic, political, or scientific value.[8] Fighting words refers to a face-to-face communication that is likely to cause the average person to respond violently.[9] Defamation is a complex concept that for present purposes may be defined as a false statement made to a third party that subjects a person to contempt, ridicule, or similar harm (see sec. 12.2). Because these forms of speech are not protected by the First Amendment, government may, if it wishes, prohibit them and punish those who engage in them.

Commercial speech, offensive or indecent speech, and defamation of public figures enjoy only limited First Amendment protection. To receive any protection, commercial speech—advertisements—must not be about an illegal activity or be misleading. For commercial speech that meets these criteria, government may still impose regulations if: (a) its interest in regulating is substantial, (b) the regulation directly advances that interest, and (c) the regulation is narrowly tailored to achieve the objective.[10] The law regarding offensive speech—speech dealing with excrement or sexual activity in a vulgar or indecent way—is not completely settled, but regulation appears permissible when such speech would be accessible to children.[11]

REGULATION OF SPEECH

Speech outside the categories listed above receives the highest level of protection, but even the most highly protected categories may be regulated when the justification is sufficiently strong. Roughly speaking, government may wish to regulate speech for either of two reasons: (a) because of concern over the content of the speech (e.g., fear that the speech will cause others to oppose a government policy) or (b) because of concern over the form of speech (e.g., fear that a broadcast over a loudspeaker outside a school, regardless of the content of the message, will disrupt the learning of those inside). The First Amendment is more concerned with the regulation of speech because of its content rather than form.[12]

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[6] Olsen v. Board of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987); Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556 (D.N.M. 1995).

[7] Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997).

[8] Miller v. California, 413 U.S. 15 (1973).

[9] Chaplinksy v. New Hampshire, 315 U.S. 568 (1942).

[10] Board of Trustees of State Univ. of N.Y., v. Fox, 492 U.S. 469 (1989); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm., 447 U.S. 557 (1980).

[11] FCC v. Pacifica Found., 438 U.S. 726 (1978); *but see*, Cohen v. California, 403 U.S. 15 (1971).

Generally speaking, in order to justify regulating the content of speech, government must prove that the regulation was "necessary to achieve a compelling state purpose or interest . . . and narrowly drawn to achieve that end." One way to satisfy this test is to show that a prohibited act of speech was "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[13] A well-known, older version of this test allowed for the prohibition of speech that created a clear and present danger of an evil the government had a right to try to prevent.[14]

Applying these definitions and tests to specific situations is not always easy. Consider for example the "heckler's veto." What if a speaker's views are so unpopular that the audience threatens violence toward the speaker? Is the speech then considered fighting words? Has it inspired imminent lawless action? Can the speaker therefore be punished? If so, then a hostile audience may negate the right to speak freely. These issues are not entirely settled.[15]

Another free speech issue concerns the individual's right of access to government property in order to speak. The Supreme Court has recognized that there are certain "traditional public forums," such as public parks, historically available for engaging in speech. In these locations, speech is stringently protected. When government voluntarily opens or designates a specific location for public speech the highest level of protection also applies. On other occasions, government may make its property available for specific and limited free speech purposes. An example would be a school board meeting where members of the public are invited to express their views on a specified topic with a time limit for each speaker. In these circumstances, regulation is permissible "as long as [it] is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[16]

Speech occurring on government property, whether in a traditional public forum or not, may be subjected to reasonable time, place, and manner restrictions. These restrictions are typically designed to accommodate competing legitimate uses of a facility or to promote safety. For example, officials may require the distribution of literature at an airport to take place away from exits to preserve easy egress. To be constitutional, such regulations must meet four criteria: (a) the regulation must be content neutral (i.e., not based on the subject matter or content of the speech), (b) the regulation must serve a significant governmental purpose, (c) the regulation must be narrowly tailored (i.e., not substantially broader than necessary to achieve its purpose), and (d) the regulation must leave ample alternative means to reach the target audience.[17]

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[12] United States v. O'Brien, 391 U.S. 367 (1968).

[13] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[14] Schenck v. United States, 249 U.S. 47 (1919).

[15] *Compare* Edwards v. South Carolina, 372 U.S. 229 (1963), *with* Feiner v. New York, 340 U.S. 315 (1951).

[16] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[17] Ward v. Rock Against Racism, 491 U.S. 781 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

When dealing with issues concerning the free speech rights of students, courts look first to the general free speech principles outlined above. However, for reasons discussed later, courts do not simply take this body of precedent and apply it directly to students. Rather, the law defining student free speech rights is based on general principles of free speech considered and often modified in light of the special status of students and public schools.

4.2 INDEPENDENT STUDENT SPEECH

Student speech may be divided into three categories. The first category consists of communications by students that take place at school but not as part of their participation in the curriculum. These are independent student communications that are not initiated or sponsored by the school. The second category of student speech occurs as part of the school program, such as articles written for the school paper. The third category is nonschool sponsored speech occurring off-campus. This section deals with issues concerning student rights to independent in-school speech. Sections 4.3 and 4.4 consider the second and third categories respectively. Section 4.5 deals with freedom of association and related free speech issues for both student and nonstudent groups.

Prior to 1969, the right not to recite the Pledge of Allegiance was the only free speech right ever specifically applied to students by the Supreme Court (see discussion of *West Virginia State Board of Education v. Barnette* in sec. 3.5). That year, the Court examined for the first time the issue of whether and under what circumstances students have a right to engage in speech of their own choosing while at school. The case is particularly significant because it marks the Supreme Court's first general consideration of whether the Bill of Rights applies to students in public schools.

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TINKER v. DES MOINES INDEPENDENT SCHOOL DISTRICT

Supreme Court of the United States, 1969
393 U.S. 503

Mr. Justice Fortas delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school."

I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Bartels v. Iowa*, 262 U.S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.

In *West Virginia v. Barnette*, 319 U.S. 624 (1943), this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend."

In *Meyer v. Nebraska*, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

> In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603, Mr. Justice Brennan, speaking for the Court, said:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of

American schools." *Shelton v. Tucker*, [364 U.S. 479] at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. . . .

Reversed and remanded.

* * *

By declaring that students do not leave their right to freedom of speech at the schoolhouse gate, the Supreme Court opened the school to the expression of a wide variety of ideas, even those disfavored by school officials or society in general. Although not prohibiting the school from trying to inculcate students in the political values and beliefs of society (see chap. 3), the *Tinker* Court did find that the Constitution required the school to operate as a marketplace of ideas in which students retain the right to disagree, to formulate their own positions, and to express their dissent to others. In short, with regard to freedom of expression, the Court of the late 1960s saw the school as a microcosm of a democratic society with students enjoying a right to freedom of expression strongly analogous to the right of citizens in society at large. But, in more recent decisions the courts seem to be drawing a sharper distinction between free expression rights in school and nonschool contexts, thus enhancing the power of school officials to control student speech.

Even the *Tinker* Court recognized that school officials have a legitimate interest in maintaining an orderly environment so the school can accomplish its educational mission and that they must sometimes regulate speech in order to do so. In striking a balance between student free expression rights and the school's legitimate needs, the Court formulated a rule for determining when school officials lawfully may regulate student speech. This test is a modified form of the clear and present danger test mentioned previously. The *Tinker* test says that school officials may only prohibit student speech that causes, or reasonably could be expected to cause, material and substantial disruption of the school's operations or that "invades" the rights of others. The latter criterion, although not often employed, presumably would permit the prohibition of speech that defames others or invades their privacy (see sec. 12.2 and 12.3).

The most important implication of this test is that school officials may not punish or prohibit speech merely because of a disagreement with the ideas expressed. Nor may they act to suppress or punish speech because of a generalized fear of disruption. They may, however, enforce reasonable regulations limiting the time, place, and manner of student expression as long as the regulations are necessary for the school to perform its educational function. For example, it is perfectly legal, perhaps even desirable, to prohibit students from making political speeches during math class, but, except under very unusual circumstances, it is not permissible to prohibit political speech at times when students are normally free to discuss topics of their own choosing, such as during lunch period.

The *Tinker* test is relevant to the regulation of all manner of independent student speech: unofficial (underground) newspapers; buttons and T-shirts bearing messages; symbols of all sorts, including symbols of gang membership and of religious affiliation or belief, such as rosaries;[18] and student demonstrations. These forms of speech may be regulated only if, in and of themselves, they are significantly disruptive of the school's educational mission or if they invade the rights of others. One court even ruled that one gay male taking another male to the prom was an expressive activity that could only be regulated according to the *Tinker* test.[19]

The lower courts' use of the *Tinker* test has produced a set of cases with mixed results. For the most part, freedom of the press regarding independent (nonschool-sponsored) publications has been vigorously protected. Courts have consistently protected students from punishment when the distribution of underground newspapers was not accompanied by disruption and the content of the papers did not invade the rights of others. Students have been protected when their writings were openly critical of school officials and school policies, encouraged students to object to those policies, or discussed controversial topics such as contraception.[20] The Seventh Circuit relied on *Tinker* to nullify a school rule that prohibited the distribution of any literature not written by a student, teacher, or school employee, the distribution of anonymous publications, and the sale of literature in school.[21]

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[18] Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997).

[19] Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980); *but see*, Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987).

However, the courts have proved more sympathetic toward school regulation of speech in racially, ethnically, or politically tense situations. In these circumstances, rules banning the wearing of provocative buttons or symbols of gang membership or ethnic pride formulated in advance to prevent violence have been upheld. For example, in *Melton v. Young*,[22] the court permitted a school to ban the wearing of the Confederate flag and related symbols when such symbols had contributed significantly to racial tensions and disruption at the school. The court was careful to show that its ruling was not inconsistent with *Tinker*:

> Unlike the *Tinker* case, where the Court found no evidence of either actual or potential disruptive conduct, but only an 'undifferentiated fear or apprehension of disturbance,' the record in the present case reflects quite clearly that there was substantial disorder at Brainerd High School throughout the 1969–70 school year, that this disorder most materially disrupted the functioning of the school, so much so that the school was in fact closed upon two occasions, that much of the controversy the previous year had centered around the use of the Confederate flag as a school symbol and that the school officials had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September of 1970.

As in *Melton*, courts are much more likely to approve rules that limit the available modes or manner of expression but not the ideas that can be expressed.[23]

As *Tinker* indicates, symbols are a form of protected speech. But, as the *Melton* court recognized, symbols worn amidst a hostile audience may produce disruption. Thus, the issue arises whether school officials must protect the wearer of a provocative symbol and control the audience or whether they may seek to limit disruption by censoring the symbol. More generally, can a hostile audience nullify the free speech rights of the speaker by threatening to be disruptive? Neither *Tinker* nor any other school case addresses the question of the "heckler's veto." Presumably, the initial response of school officials must be to protect the speaker, but a determination of when this may be deemed impractical and steps taken to silence the speaker must await further litigation.

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[20] Scoville v. Board of Educ. of Joliet Township, 425 F.2d 10 (7th Cir. 1970); Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328 (S.D. Tex. 1969); Shanley v. Northeast Indep. Sch. Dist., Bexar County, 462 F.2d 960 (5th Cir. 1972).

[21] Jacobs v. Board of Sch. Comm'rs, 490 F.2d 601 (7th Cir. 1973); *cf.*, Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979).

[22] 465 F.2d 1332 (6th Cir. 1972).

[23] *See* Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970); Olesen v. Board of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987); Hernandez v. School Dist. No. 1, Denver, 315 F. Supp. 289 (D. Colo. 1970).

In formulating the "material and substantial disruption" standard, the *Tinker* Court was primarily concerned with physical disturbance. Some courts have broadened the notion to include other possible undesirable consequences of speech, such as the potential to produce psychological stress in other students. For example, in *Trachtman v. Anker*,[24] the court permitted a school to ban the distribution by high school journalists of a questionnaire eliciting "rather personal and frank information about [other] students' sexual attitudes, preferences, knowledge and experience." School officials had instituted the rule because they feared that students asked to complete the questionnaire might be harmed psychologically. At the trial, some psychologists supported the administration's position and others contradicted it.

Trachtman illustrates the great reluctance of many courts to overrule the administrative decisions of school officials. Even if *Tinker* is interpreted to permit schools to suppress expression in order to protect students from psychological harm, *Trachtman* provided little reason to believe that students would be harmed. No one was forced to fill out the questionnaire and students were alerted to the subject matter of the questionnaire before reading it.

Sometimes, however, courts will not permit regulation of speech just because school officials fear that disruption might occur. In *Chalifoux v. New Caney Independent School District*,[25] a federal district court in Texas concluded that school officials had failed to present sufficient evidence of disruption to justify their refusal to let students wear rosaries for purely religious reasons. The district claimed that because rosaries were gang symbols for some students, a rule banning the wearing of rosaries for any reason was justified. In rejecting the district's argument, the court found that there had been only one instance on school grounds of students who claimed to be gang members wearing rosaries and that when the plaintiffs in the case wore their rosaries there was no evidence that they attracted the attention of other students. The court also found that the school's rule against "gang-related apparel" was unconstitutionally vague.

Like *Trachtman* and *Chalifoux*, much post-*Tinker* litigation deals with applications of the material-and-substantial-disruption standard. But *Tinker* also authorizes the prohibition of speech that invades the rights of others. The scope of this standard is not well defined, but presumably, it permits suppressing speech that invades the privacy of another member of the school community.[26] Defamatory material directed at a student or other private citizen may also be prohibited both on the basis of *Tinker* and because defamation is not protected by the First Amendment. However, material can only be defamatory if it makes or implies a false statement of fact, not because it expresses a negative opinion of another person (see sec. 12.2).

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[24] 563 F.2d 512 (2d Cir. 1977).

[25] 976 F. Supp. 659 (S.D. Tex. 1997).

[26] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986), *rev'd*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

School officials may also prohibit the distribution of obscene material within the school. Although courts permit a more inclusive definition of obscenity with regard to materials distributed to minors,[27] the line between obscenity and the merely sexually suggestive or offensive is not easily drawn. Even so, the Supreme Court has recently signaled a willingness to support efforts to exclude nonobscene, sexually suggestive communications at least in the context of a school-sponsored assembly.[28] However, a majority of lower courts have protected underground newspapers from suppression because they contain vulgar words.[29] In a higher education case, the Supreme Court prohibited a university from expelling a student for distributing an independent newspaper with an offensive, but not obscene, political cartoon and the headline "M - - - - - f - - - - - Acquitted" on the front page. The cartoon depicted a policeman raping the Statue of Liberty.[30] It is doubtful that the Court would reach the same conclusion in the context of a high school.

Based on the general principle that "fighting words" are not protected speech, it is reasonably clear that schools may prohibit racist and sexist insults directed at a particular individual if the insults are likely to cause the average person to fight.[31] This principle is consistent with the *Tinker* decision. Students also may be prohibited from threatening violence or lawlessness within the school.[32] It is not clear whether insults that would not cause the average person to fight may be prohibited.

It is also unclear to what extent schools may prohibit "hate speech," speech that gives offense to a racial, ethnic, religious, or gender group. In a noneducation case, *R.A.V. v. City of St. Paul*,[33] the Supreme Court ruled that government may not suppress this kind of speech merely because of a disagreement with the hateful viewpoint being expressed. Similarly, *Tinker* permits regulations designed to prevent material and substantial disruption, but not regulations designed to prevent the expression of disfavored or even offensive opinions. As a practical matter, within the context of the school, this distinction may sometimes be very difficult to draw. Further complicating matters is the fact that federal civil rights statutes—for example, Title VI and Title IX—impose a duty on school officials to prevent racial and sexual harassment in schools (see sec. 6.7 and 6.8) and the *R.A.V.* Court suggested in dicta that laws preventing harassment are constitutional. At the very least, rules regulating hate speech must be as precise and narrow as possible. No matter how well intentioned, vaguely worded rules limiting the content of speech or rules that could be used to suppress legitimate dissent will not pass constitutional muster.

In keeping with the law governing the regulation of commercial speech, schools may prohibit the on-campus distribution of advertisements for cigarettes, liquor, and other substances that may not be sold to minors.

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[27] Ginsberg v. New York, 390 U.S. 629 (1968).
[28] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[29] Scoville v. Board of Educ. of Joliet Township, 425 F.2d 10 (7th Cir. 1970).
[30] Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973).
[31] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Gooding v. Wilson, 405 U.S. 518 (1972).
[32] Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).
[33] 505 U.S. 377 (1992).

However, the extent of the school's authority to regulate nondisruptive, student-initiated on-campus advertising is unclear. In one case, the Fourth Circuit, although not relying on commercial speech doctrine, allowed school officials to prohibit the distribution of a newspaper that carried an advertisement for a "head shop," a store specializing in the sale of legal paraphernalia used for drug consumption.[34]

Religious speech by students can pose a tricky problem for school officials. Certainly, students who wish to discuss their religious views among themselves during their free time have a right to do so. But what of students who wish to publicize and promote their religious views among their schoolmates? Does freedom of speech protect the right to proselytize at school? Does the Establishment Clause require the school to prohibit this form of speech? Do other students have a right to be protected from being proselytized at school? Is there a conflict between freedom of speech and freedom of religion?

In *Thompson v. Waynesboro Area School District*,[35] the court found in favor of students who had been prohibited from distributing in their school's hallways religious literature written by an outside group. The school had argued that it had a duty to protect other students from receiving religious literature possibly in opposition to their own beliefs and to avoid the appearance that the school endorsed the religious viewpoint of the literature. However, the court concluded on the basis of testimony by the school's principal that "the restrictions . . . were at least to some extent content based" in violation of the students' freedom of speech. The school had permitted the distribution of other types of literature even if written by outside groups and the students' time, place, and manner of distribution had been nondisruptive. After employing the *Lemon* test, the court further declared that allowing distribution of the religious literature would not violate the Establishment Clause.

Other courts have made rulings similar to *Thompson*[36]; however, not all courts have been as protective of student religious speech activities. One court ruled that it was permissible to prohibit students from distributing religious literature and otherwise proselytizing in the hallways. The court found that the goal of avoiding any endorsement of religion was important and that the restriction was not a serious infringement on the rights of students because they could distribute their literature off school grounds.[37] The danger of this position is that all student free speech rights could be eliminated on the basis that students could always conduct their speech activities off-campus.

Thompson follows *Tinker* in authorizing reasonable time, place, and manner regulations of speech. Time, place, and manner regulations are like traffic rules: not designed to impede the activity they regulate but only to ensure an orderly use of crowded spaces. Regulations are legitimate for allocating a given space to competing uses but should not be used as a subterfuge to censor speech activities because of their content. For example, school officials may limit student rallies and demonstrations to specific locations and times to ensure the orderly use of school facilities[38] but not to prevent expressions of disagreement with school district or government policy.

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[34] Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980).

[35] 673 F. Supp. 1379 (M.D. Pa. 1987).

[36] Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991); Rivera v. East Otero Sch. Dist., R-1, 721 F. Supp. 1189 (D. Colo. 1989); Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989).

[37] Hemry v. School Bd. of Colo. Springs Sch. Dist. No. 11, 760 F. Supp. 856 (D. Colo. 1991).

The *Thompson* case depended in part on the court's analysis of the status of the school and, specifically, of the school's hallways as a forum of communication. Government property is divided into three different categories for purposes of determining the constitutionality of restrictions on speech making, literature distribution, and other communicative activities: the traditional, public, or open forum; the public forum by designation or limited public forum; and the nonpublic forum. Government-enforced time, place, and manner restrictions are permissible in all three forums; however, in a traditional public forum, such as a public park or sidewalk, content restrictions are only permissible if they serve a compelling state interest and are narrowly tailored to serve that interest. A public forum by designation is an area of government property that the government voluntarily opens to communicative activity, such as a municipal auditorium that traditionally has been available to any group requesting it. In a public forum by designation, whether so-designated by official policy or custom and practice, the government must observe the rules pertaining to an open forum unless it specifically decides to convert the area to a nonpublic forum. A nonpublic forum is an area designated only for specific purposes, such as an auditorium used only for Shakespearean plays. Here the government may impose restrictions on communication that are reasonable and not intended to suppress the expression of disfavored ideas. It should be noted that viewpoint suppression is not permissible in any government-controlled forum.

A number of cases including *Thompson* have judged areas such as school hallways and cafeterias to be public forums by designation, thereby imposing a heavy burden on school officials wishing to limit communications in these areas.[39] This judgment seems consistent with the reality of most schools where students traditionally have been free to communicate on topics of their own choosing while eating lunch or passing to class and also with the spirit of *Tinker*. On the other hand, classrooms during class, school auditoriums during assemblies, and other areas being used for a specific curricular purpose may more properly be viewed as nonpublic forums and permit reasonable regulations not necessitated by compelling need. Furthermore, at some schools, the grounds around the school may have the status of a public forum at least during nonschool hours. However, one court has ruled that a school's entire campus was a nonpublic forum and thus applied the standard of reasonableness to a school rule restricting the distribution of materials on school grounds.[40]

Thompson also discusses an especially sensitive First Amendment issue—prior review and suppression of publications. May school officials insist on reviewing student-initiated written materials prior to their distribution on school grounds? May officials prohibit the distribution of material that fails to meet specified criteria and, if so, under what circumstances? One case, *Eisner v. Stamford Board of Education*,[41] did affirm the constitutionality of a system of prior review that meets the following criteria: standards for determining whether a publication may or may not be distributed cannot be vague or overbroad (see sec. 5.1), there must be clear specification of when prior approval is required and to whom publications are to be submitted, a definite, brief period (say two to three days) must be established for conducting the review and it must be clearly stated that distribution may proceed if the school fails to respond within the stated time period, and students must be made aware of an appeals process in cases of adverse decisions.

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[38] Lipkis v. Caveney, 96 Cal. Rptr. 779 (Ct. App. 1971).

[39] Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991).

[40] Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1335 (1997).

In a more recent case, *Burch v. Barker*,[42] the court specifically rejected the *Eisner* court's conclusion and prohibited the school from enforcing any system of prior review. The case concerned the punishment of students who distributed a non-school-sponsored newspaper in violation of a requirement of prior review. School officials "testified that in their view a predistribution censorship policy was necessary for the safe operation of the school, to avoid distractions, hurt feelings and career damage to the faculty, to further parental and community expectations and to avoid potential school liability." However, the court pointed out that there had been no incidents of disruption relating to the distribution of this or any other publication at the school, that even "[t]he defendants' expert admitted that he knew of no studies nor any statistics showing that school districts without a system of predistribution review and censorship of student-written communication experience educational disruption as a result of underground newspapers," and that "[t]here was no evidence that anyone familiar with [the independent newspaper] confused it with any school-sponsored publication or believed its contents reflected the view of the school administration."

Thus, concluded the court, the prior restraint rule was based on exactly the sort of "undifferentiated fear or apprehension of disturbance" that the *Tinker* court rejected as a justification for limitations on speech. The court reasoned that the school had no more need to know in advance the content of independent student writing than it had to know in advance the content of independent student talking. "Interstudent communication does not interfere with what the school teaches," wrote the court; "it enriches the school environment . . ." The court was careful to point out that the school did retain the right to stop further distribution of libelous, obscene, and materially and substantially disruptive publications after it had begun and to punish those who distribute such material. But, explained the court, a system of subsequent punishment is far less dangerous than a system of prior restraint:

> A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: it is likely to bring under government scrutiny a far

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[41] 440 F.2d 803 (2d Cir. 1971).

[42] 861 F.2d 1149 (9th Cir. 1988); *see also*, Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).

> wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied . . . ; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows. [Emerson, The System of Freedom of Expression 506 (1979).]

It is likely that some courts would follow the *Burch* decision and others might follow *Eisner* or formulate their own restrictions on prior review. At a minimum, it can be said that because prior review has the potential to discourage written expression, the school bears the burden of showing that any system it employs meets First Amendment requirements.

4.3 SCHOOL-SPONSORED SPEECH

During the 1980s, in what some view as a partial departure from the spirit of *Tinker*, the Supreme Court drew a distinction between student speech occurring in school-sponsored and nonschool-sponsored contexts. As the following case shows, school officials have much greater leeway regulating student speech that has the appearance of having the "imprimatur" of the school.

HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER

Supreme Court of the United States, 1988
484 U.S. 260

Justice White delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I.

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982–1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982–1983 school year totaled $4,668.50; revenue from sales was $1,166.84. The other costs associated with the newspaper—such as supplies, textbooks, and a portion of the journalism teacher's salary—were born entirely by the Board.

The Journalism II course was taught by Robert Stergos for most of the 1982–1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred.

The District Court concluded that school officials may impose restraints on students' speech in activities that are " 'an integral part of the school's educational function' "—including the publication of a school-sponsored newspaper by a journalism class—so long as their decision has " 'a substantial and reasonable basis.' " The court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was "legitimate and reasonable," given "the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article." The court held that Reynolds' action was also justified "to avoid the impression that [the school] endorses the sexual norms of the subjects" and to shield younger students from exposure to unsuitable material. The deletion of the article on divorce was seen by the court as a reasonable response to the invasion of privacy concerns raised by the named student's remarks. Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegations, said the court, there was cause for "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class." Furthermore, the court concluded that Reynolds was justified in deleting two full pages of the newspaper, instead of deleting only the pregnancy and divorce stories or requiring that those stories be modified to address his concerns, based on his "reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question."

The Court of Appeals for the Eighth Circuit reversed. The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when " 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.' " (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)).

The Court of Appeals found "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school." School officials were entitled to censor the articles on the ground that they invaded the rights of others, according to the court, only if publication of the articles could have resulted in tort liability to the school. The court concluded that no tort action for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families. Accordingly, the court held that school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper.

We granted certiorari, and we now reverse.

II.

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." They cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours,"—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment." A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school. . . .

A.

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums. . . . Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. . . .

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982–1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over *Spectrum*." The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." Moreover, after each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that they had believed that they could publish "practically anything" in Spectrum was therefore dismissed by the District Court as simply "not credible." . . .

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum is equivocal at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "Spectrum, as a student-press publication, accepts all rights implied by the First amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. Finally, that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum," that existed in cases in which we found public forums to have been created. School officials did not evince either "by policy or by practice" any intent to open the pages of Spectrum to "indiscriminate use," by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. It is this standard rather than our decision in *Tinker*, that governs this case.

B.

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," as to require judicial intervention to protect students' constitutional rights.

III.

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982–1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

The judgment of the Court of Appeals for the Eighth Circuit is therefore reversed.

[Brennan filed a dissenting opinion, joined by Marshall and Blackmun.]

* * *

Following *Hazelwood*, student free speech cases turn on the following issues: Did the speech occur as part of the curriculum or in a situation where it might be perceived as having the endorsement of the school? If not, the case will be resolved based on the *Tinker* tests and other principles explained in sec. 4.2. If so, did school policy, either explicitly or implicitly by longstanding practice, designate the school-sponsored publication or event as a public forum? If so (e.g., a school-sponsored newspaper traditionally operated as a forum for students to express their own ideas on topics of their own choosing) the *Tinker* doctrine again applies. For example, in *Zucker v. Panitz*,[43] a pre-*Hazelwood* case that nonetheless was decided consistently with its doctrine, the court enjoined the principal from barring publication of an advertisement expressing opposition to the Vietnam War. Because the paper was a public forum, the discriminatory exclusion of disfavored points of view was not permissible. The same result was reached in a more recent case when a school newspaper that had run advertisements for the military refused advertisements for an organization advocating alternatives to military service.[44] If the answer to the second question is no, if the school publication has not been maintained as a public forum, then the doctrine announced in *Hazelwood* applies. Then the relevant question is whether the actions of school officials in restricting student speech were "reasonably related to legitimate pedagogical concerns." If the censorship had "no valid educational purpose," then the First Amendment rights of students have been violated. Additionally, some courts insist that censorship of student work even in school-sponsored, nonpublic forums must be based on preexisting rules. In one case the court said that school officials could not block the publication of a student's movie reviews of R-rated films because the school had not previously established a clearly defined policy regarding movie reviews of R-rated films.[45]

Hazelwood ensures that schools have ample authority to pursue their legitimate educational goals by regulating student speech in curricular contexts. Several courts have cited *Hazelwood* when affirming the right of teachers to prevent students from selecting a religious topic as the subject of a term paper.[46] However, the *Hazelwood* Court's emphasis on "valid educational" purposes does not authorize school officials to act on personal whim or subjective preferences. A central educational purpose of public schools is to prepare citizens to understand and exercise the right of free speech. This can best be accomplished by letting students exercise free speech rights at school to the greatest extent consistent with the school's other educational needs.

The following pre-*Hazelwood* case provides an example of both a type and context of student speech that can be regulated by school officials.

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[43] 299 F. Supp. 102 (S.D.N.Y. 1969).

[44] San Diego Comm. Against Registration & the Draft v. Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471 (9th Cir. 1986).

[45] Desilets v. Clearview Reg'l Board of Educ., 647 A.2d 150 (N.J. 1994).

[46] Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995); Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991), *vacated*, 972 F.3d 1331 (3d Cir. 1992).

BETHEL SCHOOL DISTRICT NO. 403 v. FRASER

Supreme Court of the United States, 1986
478 U.S. 675

Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I.

A.

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences."

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

> Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

B.

Respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U.S.C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive-conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.* 393 U.S. 503 (1969). The court explicitly rejected the School District's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The Court of Appeals also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school, reasoning that the School District's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." Finally, the Court of Appeals rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity. . . .

We reverse.

II.

This Court acknowledged in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

III.

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, New Basic History of the United States 228 (1968). In *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House.". . . Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen v. California*, 403 U.S. 15 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. . . .

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. . . .

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) . . .

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. . . .

IV.

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. . . . The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.

The judgment of the Court of Appeals for the Ninth Circuit is reversed.

[Marshall and Stevens filed dissenting opinions.]

* * *

Based on *Fraser* and *Hazelwood*, the school's authority to prohibit "lewd" speech in the context of school-sponsored events is well-established. More than one court has relied on *Fraser* to permit a school to ban the wearing of t-shirts or other apparel displaying sexually suggestive messages.[47] Despite these cases, it is not clear whether *Fraser* authorizes the banning of all lewd speech, even if nondisruptive (e.g., in private conversations between willing students).

Courts have also relied on *Fraser* and *Hazelwood* to permit censorship of student speeches at assemblies provided the action was based on "legitimate pedagogical concerns." Thus, in *Poling v. Murphy*,[48] the court upheld the punishment of a student whose campaign speech included "rude" and "discourteous" remarks about an assistant principal. The court noted that local officials should be given wide latitude to determine legitimate pedagogical concerns for their schools. In this case, the action was justified by the desire to teach "the art of stating one's views without indulging in personalities and without unnecessarily hurting the feelings of others."

Several courts have been willing to expand the implications of *Fraser* and *Hazelwood* beyond the contexts in which they were decided. One court relied on *Fraser* to permit a principal to suppress displays of a school symbol that Black students and parents found offensive. The court noted that, by its very nature, a "school mascot or symbol bears the stamp of approval of the school itself," and that the desire to avoid insulting a segment of the student body is a legitimate concern.[49] An Arizona court cited *Hazelwood* when approving a school's mandatory dress code on the somewhat novel theory that the students' dress might be perceived by outsiders as having the approval of the school.[50] Basing its reasoning on *Bethel*, a federal district court in Georgia concluded that school officials could, without violating a student's right not to speak, force the student to issue a public apology for her behavior. "If the 'school board' can determine 'what manner of speech' is inappropriate in the classroom . . . it can also dictate what speech is proper when fulfilling its 'charge to inculcate the habits and manners of civility' . . . especially where the prescribed utterance does not touch upon the student's other protected freedoms."[51]

Not all courts have been willing to expand the implications of *Hazelwood* and *Fraser*, however. In 1992, the Ninth Circuit considered a case in which students claimed a violation of their free speech rights when school officials required them to remove buttons critical of replacement teachers hired during a strike of regular teachers. School officials claimed the buttons were disruptive, but a replacement teacher confirmed that there had been no disruption in her class. In deciding the case, the court declined to rely on *Fraser* because the buttons, which bore such slogans as "I'm not listening to scabs" and "Do scabs bleed?," were not lewd, vulgar, or plainly offensive.

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[47] Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157 (D. Mass. 1994), *modified*, 55 F.3d. 20 (1st Cir. 1995). *See also*, Heller v. Hodgin, 928 F. Supp. 789 (S.D. Ind. 1986); Broussard v. School Bd. of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1992); Gano v. School Dist. No. 411 of Twin Falls County, Idaho, 674 F. Supp. 796 (D. Idaho 1987).

[48] 872 F.2d 757 (6th Cir. 1989).

[49] Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988).

[50] Phoenix Elementary Sch. Dist. No. 1 v. Green, 943 P.2d 836 (Ariz. Ct. App. 1997).

[51] Kicklighter v. Evans, 968 F. Supp. 712 (S.D. Ga. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998).

Hazelwood did not apply either, said the court, because this was not the kind of speech that the public was likely to believe carried the imprimatur of the school. Thus, basing its ruling solely on *Tinker*, the court ruled in favor of the students because school officials had been unable to prove that the buttons were disruptive. "The passive expression of a viewpoint in the form of a button worn on one's clothing is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom."[52] It is perfectly possible to honor the letter and spirit of *Tinker*, *Hazelwood*, and *Fraser* simultaneously, and, in fact, that is what the law requires. Nevertheless, there seems to be a tension between courts that continue to view *Tinker* as providing strong protection for student freedom of speech and those that view *Hazelwood* and *Fraser* as justifying broad limitations on student free speech. Whether courts in the future will be more sympathetic to students who wish to express their ideas at school or to schools that wish to control student speech remains to be seen.

4.4 OFF-CAMPUS SPEECH

When student off-campus speech is directly detrimental to a school's ability to perform its educational function punishment may be allowed. In *Fenton v. Stear*,[53] the court upheld the suspension of a student who made loud, insulting remarks about a teacher at a local restaurant. However, under most circumstances, school officials have no authority to discipline students for speech occurring off school grounds. The following opinion explains why.

THOMAS v. BOARD OF EDUCATION

United States Court of Appeals for the Second Circuit, 1979
607 F.2d 1043

Irving R. Kaufman, Chief Judge:

Public education in America enables our nation's youth to become responsible participants in a self-governing society. To perform this critical function effectively, professional educators must be accorded substantial discretion to oversee properly their myriad responsibilities. But our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government. Where, as in the instant case, school officials bring their punitive power to bear on the publication and distribution of a newspaper off the school grounds, that power must be cabined within the rigorous confines of the First Amendment, the ultimate safeguard of popular democracy. We hold that these limits have been exceeded in the case before us.

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[52] Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992).
[53] 423 F. Supp. 767 (W.D. Pa. 1976).

I.

Granville is a small, rural community located some sixty miles north of Albany, in upstate New York. In this quiet town, Donna Thomas, John Tiedeman, David Jones, and Richard Williams, all students in the Granville Junior-Senior High School, conceived a plan in November 1978 to produce a satirical publication addressed to the school community. As their project evolved in succeeding months, the students decided to emulate National Lampoon, a well-known publication specializing in sexual satire. After soliciting topics from their fellow students, the editors drafted articles pasquinading school lunches, cheerleaders, classmates, and teachers. Articles on masturbation and prostitution as well as puzzles and a cartoon were also prepared. Some of the initial preparation for publication occurred after school hours in the classroom of a Granville teacher, George Mager. Intermittently, the students conferred with Mager for advice on isolated questions of grammar and content. At most, it appears that only an occasional article was composed or typed within the school building, always after classes. Apart from these scant and insignificant school contacts, however, they worked exclusively in their homes, off campus and after school hours.

In mid-January, Mager first noticed a draft of an article in the students' papers and immediately informed Granville's Assistant Principal, Frederick Reed, of his discovery. Shortly thereafter, Reed summoned Tiedeman and discussed with him the "dangers" of publishing material that might offend or hurt others. Specifically, he told Tiedeman that a similar publication several years before had culminated in the suspension of the students involved. Accordingly, Reed cautioned Tiedeman to refrain from mentioning particular students and to keep the publication off school grounds.

In response to Reed's admonition, Tiedeman and his young associates deleted several proposed articles and excised students' names from others. Moreover, they assiduously endeavored to sever all connections between their publication and the school. A legend disclaiming responsibility for any copies found on school property was affixed to the newspaper's cover. Indeed, all 100 copies of the paper were produced by the facilities of a community business. Once completed, the publication was stored, with Mager's permission, in his classroom closet. At the end of each school day, the students retrieved a number of copies and sold each one for twenty-five cents to classmates at Stewart's, a store in Granville. Within a week, all but seven copies were sold, and receipts totaled $11 to $13.

The publication, entitled *Hard Times*, first surfaced within the school on January 24 when a teacher confiscated a copy from a student and presented it to Granville's principal, William Butler. Butler and Don Miller, Superintendent of Schools, initially agreed to take no action, at least until they could assess the publication's impact. On January 24 and 25, schoolwide examinations were conducted without incident, demonstrating the soundness of their initial decision. Subsequently, however, Beverly Tatko, President of the Granville Board of Education, learned of the paper's existence through her son, Peter. Shocked and offended, Tatko met with Miller and Butler on January 29 to ascertain how the school officials intended to proceed. Moreover, Tatko intimated her dissatisfaction with the administrators' inaction, and suggested convening a school board meeting to discuss the episode. Immediately Butler instituted an investigation. Mager, surrendering the seven remaining copies deposited for storage in his closet, informed Butler of his limited role in the paper's composition. Moreover, the principal determined that the four appellants were primarily responsible for publication and dissemination of the paper. Miller then telephoned each of the students' parents and invited them to attend a school board meeting that evening.

At the meeting, Butler summarized the results of his investigation and distributed copies of the publication. Later, Miller and Butler, following consultation with the Board of Education, decided to impose a number of penalties: (1) five-day suspensions to be reduced to three days if the student prepared an essay on "the potential harm to people caused by the publication of irresponsible and/or obscene writing"; (2) segregation from other students during study hall periods, throughout the month of February and possibly longer if an acceptable essay were not submitted; (3) loss of all student privileges during the period of suspension; and (4) inclusion of suspension letters in the students' school files. These sanctions took effect on February 1, when Butler personally informed each student of the punishment and then telephoned their parents to explain the decision. At the same time, he prepared a letter to the parents describing *Hard Times* as "morally offensive, indecent, and obscene," and outlining the penalties imposed. . . .

III.

The case before us . . . arises in a factual context distinct from that envisioned in *Tinker* [*v. Des Moines*, 393 U.S. 503 (1969)] and its progeny. While prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate. Indeed, the appellants diligently labored to ensure that *Hard Times* was printed outside the school, and that no copies were sold on school grounds. That a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher's closet do not alter the fact that *Hard Times* was conceived, executed, and distributed outside the school. At best, therefore, any activity within the school itself was *de minimis*.

Thus, the limited abrogation of First Amendment guarantees appropriate in *Trachtman* [*v. Anker*, 563 F.2d 512 (2d Cir. 1977)] and *Eisner* [*v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971)] is wholly out of place here for in those cases all activities were conducted on school property. Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena. Thus, wholly apart from the ultimate constitutional status of the words employed, these punishments could only have been decreed and implemented by an independent, impartial decision maker. Because the appellees do not satisfy this standard, we find that the punishments imposed here cannot withstand the proscription of the First Amendment.

We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. The First Amendment will not abide the additional chill on protected expression that would inevitably emanate from such a practice. Indeed, experience teaches that future communications would be inhibited regardless of the intentions of well meaning school officials. . . .

It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon*, the inspiration for *Hard Times*, at a neighborhood newsstand and lends it to a school friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of parens patriae.

The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression. In addition to their vested interest and susceptibility to community pressure, they are generally unversed in difficult constitutional concepts such as libel and obscenity. Since superintendents and principals may act "arbitrarily, erratically, or unfairly," the chill on expression is greatly exacerbated. Indeed, while Granville officials staunchly maintained that *Hard Times* is obscene, there is no evidence they ever consulted the constitutional standard embodied *in Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968), before suspending the appellants.

* * *

Although *Thomas* was decided before *Hazelwood*, their outcomes are consistent. Arguably, *Hazelwood* might permit school officials to control the contents of an independent newspaper or website produced in such a manner that it would appear to the community to have the imprimatur of the school. However, in *Thomas*, the student editors of *Hard Times* had taken steps to separate their work from the school and followed the suggestions of school officials regarding this issue. Students have the right to publish—either by traditional or electronic means—the information that they attend a particular school and to disseminate facts and information about their school unless they do so in a manner that appears to be school-sponsored or that materially and substantially disrupts the school. In general, school officials are prohibited from trying to regulate the off-campus behavior of their students except behavior that has direct effect on the operation of the school, but the prohibition is especially strong when constitutional rights such as free speech are implicated (see sec. 5.1).

4.5 FREEDOM OF ASSOCIATION AND USE OF SCHOOL FACILITIES

By organizing associations and speaking as a group individuals can amplify their voices. Although freedom of association is not explicitly guaranteed by the First Amendment, the Supreme Court has recognized it as a corollary of free speech. As such, the Court has said that public colleges may not deny official recognition to student political organizations or bar them from campus except by application of the *Tinker* test.[54] Several other cases have forced public universities to recognize gay student organizations.[55]

What these cases tell us about the right of association in elementary and secondary schools is not entirely clear. Courts commonly view lower schools as having both more authority over their students than colleges and a greater duty to protect their students (see chap. 12). These principles might justify excluding student organizations in some situations when colleges would have to allow them. Except with regard to religious organizations seeking access to school facilities, there has been little litigation exploring the right of association of high school students. The cases that have been brought generally follow *Tinker* and *Healy* in prohibiting schools from banning student groups because they embrace disfavored ideas. For example, in *Dixon v. Beresh*,[56] the court found unconstitutional a principal's refusal to grant recognition as a school organization to a student-organized "Young Socialist Alliance." The principal was acting under a board of education policy forbidding recognition of any group "advocating controversial ideas" or "stressing one side of issues." The court reasoned that the effect of the policy was to suppress the expression of ideas and that there was no legitimate forecast of "material and substantial disruption as required by *Tinker*."

As discussed in sec. 3.7, in secondary schools that have created a limited open forum, the Equal Access Act (EAA)[57] prohibits denying use of school facilities to student-initiated groups because of the subject matter or content of the group's speech. Whether the EAA applies or not, the Constitution prohibits withholding recognition from any group because of a disagreement with the group's beliefs or ideas.

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[54] Healy v. James, 408 U.S. 169 (1972).

[55] Gay Lib v. University of Mo., 558 F.2d 848 (8th Cir. 1977); Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984).

[56] 361 F. Supp. 253 (E.D. Mich. 1973).

[57] 20 U.S.C. §4071.

There may be other legitimate reasons for denying recognition or access to school facilities to student groups. A school might legitimately decide not to recognize any student group for administrative ease or to reserve its resources for official educational purposes.[58] Student groups may be excluded if they materially and substantially disrupt the school's educational mission or invade the rights of others. Student groups may also be excluded on the basis of what they do as opposed to what they say or think. Thus, schools may bar student organizations that discriminate on the basis of race or gender.[59]

USE OF SCHOOL FACILITIES BY OUTSIDE GROUPS

These same principles apply to nonstudent groups and speakers under conditions when other external groups have been granted access to the school. Exclusion to prevent violence or disruption or of organizations that discriminate is permissible[60] but not to suppress the expression of ideas.[61]

Some of the most difficult issues arise with regard to outside groups that wish to use school facilities for religious purposes. Does a school district's permitting a church or religious study group to use its facilities constitute support or promotion of religion in violation of the Establishment Clause? Does the denial of permission constitute a violation of the religious group's free speech or free exercise rights?

In 1993, the Supreme Court considered these issues in *Lamb's Chapel v. Center Moriches Union Free School District*.[62] The case involved a New York state law authorizing local school boards to adopt reasonable regulations for the use of school property for ten specific purposes. The list included social, civic, recreational, and entertainment but not religious purposes. Pursuant to the law, a local school district adopted a policy permitting the use of its facilities after school hours for a variety of civic and political purposes provided that "the school premises shall not be used by any group for religious purposes." Based on this policy, the district denied permission to Lamb's Chapel, a local evangelical organization, to show a six-part film series that featured lectures by psychologists who advocated that "Christian family values [be] instilled at an early stage." The district explained that the series appeared "church related."

The Supreme Court unanimously ruled that the district's rule was unconstitutional as applied to the film series. The Court acknowledged that the district, like a private owner of property, could have preserved its property for the use to which it was dedicated and need not have permitted any after-hours use of its property. However, once the district voluntarily made its facilities available for use by after-hours groups it could not enforce rules designed to exclude expression of specific points of view. The Court explained its ruling as follows:

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[58] Student Coalition for Peace v. Lower Merion Sch. Dist. Bd., 776 F.2d 431 (3d Cir. 1985).

[59] New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988); Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[60] Solmitz v. Maine Sch. Admin. Dist. No. 59, 495 A.2d 812 (Me. 1985); Pickings v. Bruce, 430 F.2d 595 (8th Cir. 1970).

[61] Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989).

[62] 508 U.S. 384 (1993).

> That all religions and all uses for religious purposes are treated alike under [the rule] does not answer the critical question of whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious viewpoint. There is no suggestion [that] a lecture or film about child-rearing and family values would not be a use for social or civic purposes otherwise permitted by [the] Rule. That subject matter is not one that the District has placed off-limits to any and all speakers. Nor is there any indication . . . that the application to exhibit the particular film involved here was or would have been denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view denial on that basis was plainly invalid . . . 'although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose special benefit the forum was created' . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

The Court further concluded that to permit Lamb's Chapel to use the facilities would not violate the Establishment Clause because it would have neither the purpose nor primary effect of advancing or inhibiting religion and would not foster excessive entanglement with religion.

Lamb's Chapel has provided the basis for successful lawsuits by a number of religious groups as well as political groups that have been denied access to school facilities.[63] Neither access to school facilities nor the fee charged may be based on the viewpoint of the group requesting use.[64] Nor may school facilities generally available to civic and political groups be denied to groups seeking to "convert" members of the audience.[65] Districts are permitted to allocate facilities on a first-come, first-served basis.[66]

Lamb's Chapel does not resolve the issue of whether a school that is generally available for use by outside groups must be made available for religious services and ceremonies. *Bronx Household v. Community School District No. 10*[67] involved a church's objection to a school's policy of opening its facilities for use by a wide variety of outside organizations but excluding use for the "conduct of religious services or religious instruction." Religious organizations were permitted to use the facilities to present discussions of issues from a religious viewpoint. In upholding the school's policy the Second Circuit said that the exclusion of religious services and instruction was not, as in *Lamb's Chapel*, unconstitutionally based on "viewpoint," rather it was based on "subject matter." Furthermore, the court found that it was reasonable for the district to prohibit the use of the school facilities for regular religious worship. "We think that it is reasonable for these authorities to consider the effect upon the minds of middle school children of designating their school as a church." However, *Bronx Household* should not be read to mean that school districts may not give churches access to school facilities on the same terms as other outside groups.

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[63] Good News/Good Sports Club v. School Dist., 28 F.3d 1501 (8th Cir. 1994); Local Organizing Comm., Denver Chapter, Million Man March v. Cook, 922 F. Supp. 1494 (D. Colo. 1996); Trinity United Methodist Parish v. Board of Educ., City of Newburgh, 907 F. Supp. 707 (S.D.N.Y. 1995).

[64] Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir. 1994).

[65] Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir. 1990).

[66] Ku Klux Klan v. Martin Luther King Worshipers, 735 F. Supp. 745 (M.D. Tenn. 1990).

[67] 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998).

Outside groups may desire access to school events, such as job fairs or to school publications. In *Searcey v. Harris*,[68] a peace group wanted to participate in a school's job fair in order to discourage students from entering the military but the school refused. Although the court agreed that the fair was not a public forum in that it was not open to any group that wanted to discuss any topic, the peace group still won the suit because the refusal was solely and impermissibly based on the district's disapproval of the group's point of view. In another case, the Ninth Circuit rejected a claim by Planned Parenthood that its free speech rights were violated when it was denied the opportunity to purchase advertising space in school publications. Basing its ruling on *Hazelwood*, the court upheld the school's position that it may properly prohibit all discussion of controversial topics in its publications and seek to avoid creating the impression that it approves of Planned Parenthood's position. The court found that the school's policy of excluding advertising relating to birth control products and information was viewpoint neutral.[69]

The lesson of all these cases is that when school officials issue an open invitation, either explicitly or by custom and practice, to outside groups to use their facilities to discuss certain topics, they may not seek to exclude a particular point of view concerning an approved topic. Similarly, when schools invite outside groups to participate in a school-sponsored event or to advertise in a school-sponsored forum, viewpoint may not be the basis of deciding which groups to admit and which to exclude. Thus, a school could limit the availability of its facilities to groups concerned with educational issues but it could not then exclude groups advocating vouchers or home schooling.

4.6 SUMMARY

By their very nature schools are places where students often wish to express their ideas through speech and other means. Inevitably, school officials will disagree with some student ideas and disapprove of some of their means of expression. However, the time has long past when schools could simply order students to keep their opinions to themselves. Like all members of society, students have a constitutional right to freedom of speech and expression even when they pass through the schoolhouse gate. Like all arms of government, the public school must honor this right. In general, government may regulate speech only when necessary to achieve a compelling state purpose and when the regulations are no more extensive than necessary.

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[68] 888 F.2d 1314 (11th Cir. 1989).

[69] Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991) (en banc).

At the same time, all student rights including free speech must be understood in light of the school's need to accomplish its educational mission. In *Tinker v. Des Moines* the Supreme Court ruled that student-initiated speech cannot be curtailed based on disagreement with the ideas expressed. Speech may be prohibited only if it materially and substantially disrupts the school's legitimate educational purpose or if it invades the rights of others. Reasonable regulation of the time, place, and manner of speech designed to accommodate competing interests and demand for facilities may also be enforced.

The school has much greater authority to regulate speech occurring as part of its curriculum or in any situation where speech appears to have the endorsement of the school. In these situations regulation is permissible as long as it is "reasonably related to legitimate educational concerns." The school may control the content and style of the official school newspaper for various reasons, such as to teach journalism lessons, or may prohibit lewd and insulting campaign speeches at school assemblies. However, prohibition of speech because of a disagreement with the ideas expressed is still not allowed.

Under most circumstances freedom of speech also prohibits schools from restraining students from distributing independent publications at school, from denying access to school facilities to student groups because of disagreement with the group's beliefs, and from limiting student off-campus speech in any way. The regulation of all these activities is permissible when necessary to avoid material and substantial disruption of the school. The school may limit use of its facilities by outside groups but may not discriminate based on the viewpoint of the outside groups wishing to use the school.

CHAPTER 5

STUDENT DISCIPLINE

Most school administrators are all too familiar with activities designed to control student conduct. Indeed, the duties of school administrators have always included tasks that, in society at large, are the province of legislators, police, courts, and penal systems. This chapter provides the legal basis for the performance of these tasks. The chapter considers the formulation of school rules, the investigation of suspected misconduct, and the assignment and enforcement of punishment.

The always complex job of maintaining order in school and disciplining students when they misbehave has become even more difficult because of a rise in the number of disciplinary problems in schools and because of changes in the law. Both students and school officials report an increase in violence, drug use, and other illegal and disruptive acts. Parents consistently place school safety at or near the top of their list of educational concerns. Highly publicized incidents of shootings and other serious criminal acts at school have led to public and legislative pressure to make the schools safer. Researchers have concluded that when the atmosphere of the school leads students to feel unsafe, learning decreases, thereby further emphasizing the need to maintain an orderly atmosphere.

These sociological and psychological trends have been accompanied by significant changes in the law. These changes have both empowered school officials to deal with disruptions and increased the legal threat to school officials if they fail to deal with violence and crime adequately. Some states' constitutions actually give students the right to safe schools.[1] Many states have adopted so-called Safe School Acts that impose on school boards a duty to adopt disciplinary policy review committees and student codes of conduct and require school administrators to report to law enforcement officials whenever they believe that certain specified categories of criminal activity have occurred at school. School officials who fail to comply with these requirements may face liability for negligent indifference to dangerous school conditions. This statutory liability supplements the preexisting common law duty (discussed in chap. 12) that all school officials have to provide adequate supervision in schools and to protect students from violence by other students. Some Safe School Acts also make the perpetrator of violence liable to the victim for double or even treble damages and make parents accountable for the harmful behavior of their children. Criminal penalties have also been increased for students possessing guns or drugs or committing violence in school.

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[1] Philip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909 (W. Va. 1996).

At the same time, school officials who are overly zealous in carrying out their disciplinary responsibilities face possible legal liability for violating the rights of their students under federal and state law. A federal law known as Section 1983 makes it possible for students to collect monetary damages from school officials who violate their clearly established constitutional or statutory rights (see sec. 12.9). School officials who conduct very invasive searches of students in violation of constitutional guidelines or who impose impermissibly harsh or cruel punishment on students are especially vulnerable.

School officials thus must walk a narrow path. The law demands, communities expect, and students deserve a vigorous effort to maintain a safe and orderly school environment. Yet, in all functions relating to student discipline, the law demands that the rights of students as persons under federal and state constitutions be protected. At the same time, the law recognizes that the school's need for an orderly environment and the special status of students as children justify more control than the society at large exercises over adults. Many of the most difficult questions in education law concern the conflict between the individual rights of students and the corporate needs of the school.

The basic principle of lawful student discipline is that schools can justify only as much rule making, policing, adjudicating, and punishing as is necessary to promote their legitimate goals. Schools should utilize all lawful means to control student behavior when control is necessary to protect persons or property, promote learning, or prevent disruption of the educational process; however, gratuitous control of students is not justifiable. The law will support school officials when they act reasonably to promote safety and order, but care must be taken not to suppress or punish unpopular behavior when there is no legitimate reason to do so.

5.1 THE MAKING OF RULES

State legislatures have delegated to local school boards, usually in broad and general terms, the authority to maintain discipline and order in the schools. Once, most school boards executed their delegated disciplinary authority without a large number of expressly stated written rules of student conduct. Students were simply ordered not to misbehave, and it was left to administrators and teachers to decide whether misbehavior had occurred and what to do about it. This system—mirroring the internal processes of the family—was consistent with the view of educators as surrogate parents.

Just like parents, educators had broad latitude in evaluating and responding to the behavior of the children in their charge.

Discipline without rules has certain advantages especially when the disciplinarian is thoughtful and well-meaning. The absence of preestablished regulations and procedures can promote the creative resolution of disciplinary problems, whereas rigid regulation can promote conflict, with students and school officials behaving like opposing lawyers seeking strategic advantage through the exploitation of loopholes. An excessive reliance on rules can change the relationship between students and teachers from familiar to estranged.

However, discipline without a formal written set of rules has important disadvantages. Broad discretion almost inevitably leads to the inequitable application of standards and punishment on the basis of race, sex, social class, personal dislike, or negative reputation. Moreover, in the absence of a formal system of rules, students may remain confused and uncertain about the limits of acceptable behavior.

In the terminology of constitutional law, an authority system that operates without explicit rules raises an issue of due process. The Fourteenth Amendment prohibits states from depriving persons of life, liberty, or property without due process of law. One of the implications of this requirement is that people may be convicted and punished for criminal acts only on the basis of laws that were adopted prior to the commission of the acts. The idea is that fairness demands that people be notified in advance of behavior that is unacceptable so that they may conform their behavior to required standards. In addition, the existence of preestablished rules helps avoid the problem of different law enforcement officials taking different views as to what is allowable.

Sensitive to the dangers of interjecting the formal requirements of adult criminal law into the schools, the courts have struck a compromise. On the one hand, punishment of flagrantly disruptive and destructive behaviors that ordinary students can reasonably be expected to realize are prohibited, such as fighting and vandalism, is permitted even without prior announcement of rules.[2] On the other hand, most courts do require preestablished rules for the punishment of conduct that many students would not realize as a matter of common sense is prohibited. A few courts go so far as to require that the rules be written on constitutional grounds[3] and a few states' statutes also require written rules. Additionally, some courts require published rules when speech activities are prohibited or when penalties are particularly severe.[4] Even if courts do not always demand it, many schools wisely choose to develop a written code of student conduct to encourage compliance and avoid unfairness, confusion, and potential litigation.

School boards generally have broad powers to control student conduct delegated to them by the legislature[5] that they in turn may delegate to their professional employees. However, some rules go beyond the scope of the school's authority. *Neuhaus v. Frederico*[6] involved a challenge by a group of boys to a high school's rule regulating the length of male students' hair. The rule had been adopted by a committee of students, parents, and teachers and approved by a vote of the student body as part of a dress code. The school defended the rule as authorized by a state statute allowing school boards to "establish rules for the government of the schools and pupils." Interpreting the statute as authorizing only rules that "have some reasonable connection to the educational process," the court ruled in favor of the students. The school could present no credible evidence that long hair on boys was likely to cause disruption or pose a health and safety risk or in any way interfere with the operation of the school. Furthermore, the court was concerned that the rule impermissibly and arbitrarily regulated off-campus behavior because, unlike clothing, hair length could not be modified upon returning home. Finally, although the court commended the school for allowing students to develop their own dress code, it pointed out that the school could not enforce a rule that was beyond its scope of authority regardless of the origin of the rule.

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[2] Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Shanely v. Northeast Indep. Sch. Dist., Bexar County, 462 F.2d 960 (5th Cir. 1972).

[3] Dillon v. Pulaski County Special Sch. Dist., 468 F. Supp. 54 (E.D. Ark. 1978).

[4] Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977).

[5] In re Suspension of Huffer, 546 N.E.2d 1308 (Ohio 1989).

Several other, but not all, courts have agreed with *Neuhaus* that hair regulations are beyond the statutory authority of the school.[7] However, most cases attacking rules governing the length of students' hair are based on state or federal constitutional protections of free speech, free exercise of religion, or equal protection. Cases based on free speech often fail because many courts do not consider hair length a form of expression.[8] Likewise, free exercise claims usually fail unless the plaintiff can show that the regulation requires violating an important and clearly established tenet of religion, not just custom or preference.[9] In one case, Native-American students were able to use the Free Exercise Clause in conjunction with other constitutional principles to bar enforcement of a rule that boys' hair should be no longer than the top of a standard dress collar. The plaintiffs presented expert testimony that long hair was an aspect of Native-American religious life, that it had important symbolic meaning (i.e., that it was a form of speech), and that the right of parents to control the upbringing would be compromised by enforcement of the rule. The school was unable to prove that the hair regulation was necessary to maintain order in the school.[10]

Fourteenth-Amendment-based challenges to hair regulation often invoke the right of privacy, a liberty interest protected by the Due Process Clause.[11] Plaintiffs have succeeded in the First, Second, Fourth, Seventh, and Eighth Circuits,[12] but the Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have upheld the regulations.[13] In a recent case based on its state constitution, the Texas Supreme Court concluded that minors do not have the same constitutional rights under the Texas Constitution as adults. Hence, a school's restrictions on hair length and the wearing of earrings did not raise a state constitutional issue.[14] It is questionable whether most other state high courts would endorse this reasoning.

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[6] 505 P.2d 939 (Or. Ct. App. 1973).

[7] Independent Sch. Dist. No. 8 v. Swanson, 553 P.2d 496 (Okla. 1976).

[8] Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); *but see*, Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).

[9] Hatch v. Goerke, 502 F.2d 11 89 (10th Cir. 1974); New Rider v. Board of Educ., 480 F.2d 699 (10th Cir. 1973); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979).

[10] Alabama & Coushatta Tribes v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993), *remanded*, 20 F.3d 469 (5th Cir. 1994).

[11] Griswold v. Connecticut, 381 U.S. 479 (1965).

[12] *E.g.*, Massie v. Henry, 455 F.2d 779 (4th Cir. 1972).

The authority of school officials to regulate what students wear has also been challenged on statutory and constitutional grounds. For the most part courts have affirmed the statutory authority of schools to enforce reasonable clothing regulations. For example, in *Fowler v. Williamson*,[15] the court allowed the school to prohibit the wearing of jeans to graduation. However, several courts have concluded that school officials exceeded their authority when they barred female students from wearing pants or culottes without proof that wearing these garments caused disruption, endangered the safety of students, harmed instructional effectiveness, or injured student morals.[16]

In evaluating a constitutionally-based challenge to a school's dress code, the court in *Wallace v. Ford*[17] concluded that although students do enjoy a constitutional right to govern their appearance, the school may nevertheless enforce rules designed to promote its educational mission. The court noted that less justification is needed for clothing regulations than hair regulations because the latter also control students' appearance away from school but the former do not. Based on this approach, the court upheld regulations prohibiting excessively tight skirts or pants and skirts more than six inches above the knee but disallowed regulations prohibiting frayed trousers, tie-dyed clothing, and longer skirts. Another court disallowed a rule prohibiting the wearing of jeans.[18] Generally, school dress codes are constitutionally permissible when necessary to avoid distraction or disruption of the educational process.

The once-common practice of excluding married students from school was found to exceed the district's authority in *Carrollton-Farmers Branch Independent School District v. Knight*[19]; however, several courts have allowed rules excluding married students from extracurricular activities.[20] Even if they are within the school's statutory authority, rules that discriminate against married students might violate their constitutional right of privacy.[21]

When schools seek to regulate off-campus behavior their authority may be challenged. A number of mostly older decisions affirm the school's authority to prohibit such conduct as drinking, drug use, fighting, and patronizing certain stores and events, but they are of questionable validity today. Most recent cases only permit regulation of off-campus conduct that "has a direct and immediate effect on the discipline or general welfare of the school."[22] Thus, although disciplining a student for cursing at a teacher off school grounds is definitely permissible, most out-of-school behavior is beyond the school's power. (See sec. 4.4 regarding regulation of off-campus speech.)

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[13] *E.g.*, King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971).

[14] Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447 (Tex. 1995).

[15] 251 S.E.2d 889 (N.C. Ct. App. 1979) and 448 F. Supp. 497 (W.D.N.C. 1978).

[16] Johnson v. Joint Sch. Dist. No. 60, 508 P.2d 547 (Idaho 1973).

[17] 346 F. Supp. 156 (E.D. Ark. 1972).

[18] Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970).

[19] 418 S.W.2d 535 (Tex.Ct. App. 1967).

[20] Board of Dir. of the Indep. Sch. Dist. of Waterloo v. Green, 147 N.W.2d 854 (Iowa 1967).

[21] Griswold v. Connecticut, 381 U.S. 479 (1965).

School rules may also be challenged on the constitutional grounds of vagueness or overbreadth. **Vague** rules violate the Due Process Clause of the Fourteenth Amendment because, like no rules at all, they fail to provide adequate notice of what is impermissible and they invite uneven, biased, and variable application. In criminal law a rule is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[23] Courts do not require that school rules be as precisely crafted as criminal laws, but courts nevertheless insist that rules give students a reasonable opportunity to know and understand what they may and may not do.

Thus, one court blocked the enforcement of a regulation that stated that "Gang related activities such as display of 'colors,' symbols, signals, signs, etc. will not be tolerated on school grounds." The Eighth Circuit found the regulation impermissibly vague because the term "gang related activities" was not defined and left students unclear about what was not allowed and gave school officials too much discretion to decide what constituted a gang symbol. The court noted that the rule could have been used to punish students for wearing cross earrings or baseball caps or if their shoes were untied.[24] Other examples of school rules found to be impermissibly vague are:

- A prohibition of the use of alcohol or drugs "prior to" coming on school grounds,[25]
- A rule against "misconduct,"[26]
- A rule forbidding "inappropriate actions" or "unacceptable behaviors,"[27] and
- A requirement that students be "neatly dressed and groomed, maintaining standards of modesty and good taste conducive to an educational atmosphere."[28]

However, in *Alex v. Allen*,[29] the court disagreed with students who claimed that rules against "flagrant disrespect of teachers," "loitering in the heavy areas of traffic," "rowdy behavior or running in the building," "locker misuse," "extreme dress or appearance which is disruptive to class," and "handholding and other displays of affection" were impermissibly vague. The court pointed out that schools should have more flexibility in making rules than legislatures do in writing criminal statutes. The court felt that the challenged rules were directed at conduct that "clearly disrupts the educational process," and that they spelled out in "sufficient detail the conduct that is forbidden."

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[22] Board of Educ. of Millbrook Cent. Sch. Dist. v. Ambach, 465 N.Y.S.2d 77 (App. Div. 1983).

[23] Connally v. General Constr., 269 U.S. 385 (1926).

[24] Stephenson v. Davenport Community Sch. Dist., 110 F.3d 1303 (8th Cir. 1997).

[25] Claiborne v. Beebe Sch. Dist., 687 F. Supp. 1358 (E.D. Ark. 1988).

[26] Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

[27] Galveston Indep. Sch. Dist,. v. Boothe, 590 S.W.2d 553 (Tex. Ct. App. 1979).

[28] Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).

[29] 409 F. Supp. 379 (W.D. Pa. 1976).

The *Alex* court also rejected the claim that the challenged rules were overbroad. An **overbroad** rule does more than necessary to achieve the desired ends and in so doing infringes on constitutionally protected rights. The issue of overbreadth arises most often in connection with the regulation of speech.[30] Rules are unconstitutionally overbroad not because they prohibit a specific constitutionally protected act but because they could be applied to other constitutionally protected behavior. For example, a student punished for distributing obscene literature at school in violation of a school rule banning distribution of all literature could object to the overbreadth of the rule. The distribution of obscene material is not constitutionally protected, but many of the behaviors that the rule might inhibit are. Rules prohibiting "hate speech," that is, speech that attacks or offends particular racial, ethnic, or gender groups, may raise the issues of vagueness and overbreadth (see sec. 4.2).

In addition to the constraints of the Constitution, federal statutes may limit the school's authority to formulate rules. For example, the school could not enforce rules prohibiting students from engaging in meetings that are their right under the Equal Access Act (see sec. 3.7). Federal law also regulates the disciplining of disabled students (see sec. 7.3).

5.2 THE USE OF FORCE TO CONTROL STUDENTS

This section considers the law relating to the use of force by school officials to enforce school rules and prevent injury, damage, or disruption. Examples include forcibly conducting a misbehaving student to the principal's office, physically seizing fighting students to pull them apart, and force in self-defense. Corporal punishment, the deliberate inflicting of physical pain to punish misbehavior, is considered separately in sec. 5.5.

Both the federal Constitution and state common law and statute bear on the authority of school officials to use force to maintain order in the school. The relevant provisions of the Constitution are the Fourth Amendment protection against "unreasonable . . . seizures" and the Due Process Clause of the Fourteenth Amendment. The Seventh Circuit has ruled that a teacher or administrator violates the Fourth Amendment by physically controlling a student "only when the restriction of liberty is unreasonable under the circumstances then existing and apparent." Based on this principle, the court concluded that a teacher did not violate a student's Fourth Amendment right when the teacher grabbed the student first by the wrist and subsequently by the elbow to speed her exit from the classroom. The student had engaged in a verbal altercation that had the potential to erupt into violence.[31]

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[30] Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

The Fourth, Fifth, Sixth, Ninth, and Tenth Circuits have recognized that the Due Process Clause's protection of bodily integrity and security applies to students. The Ninth Circuit has outlined a set of criteria for deciding whether this right has been violated when a school official forcibly controls a student: (a) the need for the use of force, (b) the relation between the need and the action, (c) the extent of harm to the student, and (d) whether the action was taken in good faith or for the purpose of causing harm. The court used these factors to find against a high school principal who, with little provocation, punched, choked, and slapped three different students.[32] These doctrine and decisions indicate that using force to control students is constitutionally permissible when necessary to maintain order as long as the force used is proportional to the need.

State common law, both civil and criminal, and state criminal statutes generally prohibit the use of force by one person against another with certain exceptions. Parents, school officials, and other adults with charge over children may use reasonable force to maintain order and discipline. The reasonableness of the force directed at a child is determined by a number of factors including its purpose, the age, sex, physical and mental condition of the child, the nature of the offense, the influence of the child's behavior on other children, the extent of the harm inflicted, and whether the force was disproportionate to the offense or was unnecessarily degrading.[33] In general, school officials may use force to enforce school rules when it is necessary and reasonable under the circumstances. (See sec. 12.1 for a discussion of tort claims that may result from unreasonable uses of force that cause harm to a student.)

5.3 THE INVESTIGATION OF MISCONDUCT

When school officials suspect a violation of a school rule or that a criminal act has been committed by a student at school, they may need to investigate. When the safety of other students or personnel is involved, they may have a duty to investigate (see sec. 12.4 on the duty to maintain a safe environment). Investigations can take many forms, including surveillance, questioning, and searching students, their possessions, or their lockers.

Anybody even vaguely familiar with the controversies surrounding police investigations will realize that these investigations can and do implicate important constitutional rights. The Fifth Amendment rights not to be a witness against oneself, to be protected from a coerced confession, and to receive a *Miranda* warning and the Fourth Amendment right not to be subjected to a search without probable cause are vigorously protected in the adult criminal law. The question here is whether these protections extend into the schools. Do these same rights protect students in their in-school dealings with the police and school officials?

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[31] Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995).

[32] P. B. v. Koch, 96 F.3d 1298 (9th Cir. 1996).

[33] Sansone v. Bechtel, 429 A.2d 820 (Conn. 1980).

Regarding the police, the answer is yes. Minors do enjoy many of the same constitutional protections from the police as adults when suspected of a crime.[34] Whether these same protections must guide the investigations of school officials is more complex.

In *Miranda v. Arizona*,[35] the Supreme Court said that the Fifth Amendment's protection against being forced to be a witness against oneself requires that suspects taken into custody be informed of their right to remain silent and to consult an attorney and of certain other rights. Interrogations may only proceed with strict procedural safeguards against forced self-incrimination. Some student-plaintiffs have argued that the same protections should be afforded to students under investigation by school officials; however, courts have concluded that when an interrogation is conducted entirely by school officials with no police involvement, students do not have the right to remain silent and the school officials are not required to give the student a *Miranda* warning.[36] One court ruled that a student's rights were not violated when a school official interrogated the student for twenty minutes about a bomb threat after two other students had implicated him.[37]

The Fourth Amendment protects against "unreasonable searches and seizures." Fourth Amendment protections apply only in cases when someone is searched. To determine if an investigation is a search for Fourth Amendment purposes, courts ask whether the person allegedly searched had an expectation of privacy and, if so, whether the expectation was one that society recognizes as reasonable.[38] Consider, for example, an item left in "plain view" on the front seat of an automobile parked in a school's parking lot. A school official or police officer who looks into the car and sees the item has not conducted a search because leaving the item on the front seat of the car indicates that the owner had no expectation of privacy or that any claimed expectation of privacy is not reasonable.[39] Similarly, there is no expectation of privacy if someone loses a purse or backpack. Thus, if school officials look through a lost purse for identification and find controlled substances, the controlled substances are considered to have been in plain view.[40] Surveillance, even surreptitious surveillance through a two-way mirror, of areas normally open to inspection, such as classrooms, school yards, and even public areas of a washroom, is not a search.[41]

Locker investigations by school officials are not regarded by most courts as searches. Courts commonly reason that because the locker is jointly controlled by the student and the school, the student does not have a reasonable expectation of privacy, at least against school officials.[42] In most jurisdictions, school officials are free to conduct random, unannounced locker searches for drugs or to use drug-sniffing dogs to identify lockers for further examination. They must be careful, however, not to select lockers for examination on the basis of race, gender, or other discriminatory criteria. In a few states, courts have taken the opposite view: students do have an expectation of privacy with respect to their lockers against school officials.[43] In these states, school officials may not search lockers unless the criteria discussed later in this section are met. However, one court has ruled that, even if students do have an expectation of privacy, school officials may still search lockers without cause if they have informed students in advance of the possibility of random searches.[44]

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[34] *In re* Gault, 387 U.S. 1 (1967).

[35] 384 U.S. 436 (1966).

[36] Boynton v. Casey, 543 F. Supp. 995 (D. Me. 1982).

[37] Edwards v. Rees, 883 F.2d 882 (10th 1989).

[38] Katz v. United States, 389 U.S. 347 (1967) (Harlan, J. concurring).

[39] State v. D.T.W., 425 So. 2d 1383 (Fla. Dist. Ct. App. 1983); Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971).

[40] State v. Johnson, 530 P.2d 910 (Ariz. Ct. App. 1975).

[41] Stern v. New Haven Community Sch., 529 F. Supp. 31 (E.D. Mich. 1981).

[42] People v. Overton, 229 N.E.2d 596 (N.Y. 1967) and 249 N.E.2d 366 (N.Y. 1969).

Even in jurisdictions where random locker searches are permitted, it may still be impermissible to randomly search backpacks and other containers found in lockers.[45] Some courts view a school official's examination of the contents of a locker as a search subject to Fourth Amendment safeguards.[46] An Ohio Court of Appeals ruled unconstitutional a state statute that authorized school officials to search lockers and contents of lockers if the school posted a notice that the lockers were the property of the school and subject to random search at any time. The state simply had no right, said the court, to proclaim that, contrary to the right of privacy guaranteed by the U.S. Constitution, personal items like book bags were subject to search at will.[47] With so much uncertainty in this area, it would seem prudent for schools wishing to retain the right to randomly search student lockers to inform students in advance of the possibility and for all schools to refrain from searching closed containers found within lockers unless the criteria for reasonable searches discussed later in this section are met.

If the police initiate and carry out a locker search, the investigation is viewed as a search for Fourth Amendment purposes, whether or not school officials also take part in the search. Other joint investigations of lockers by police and school officials may be viewed as searches depending on the circumstances and the court's view of the status of school lockers.[48]

Whether a sniff by a dog trained to detect drugs is a search is only partially settled. The Supreme Court has said that a dog sniff of luggage at an airport is not a search.[49] However, the use of drug-sniffing dogs at school raises different issues. In *Horton v. Goose Creek Independent School District*,[50] the Fifth Circuit Court of Appeals ruled that dog sniffing of cars or lockers is not a search but that sniffing of students themselves is a search for Fourth Amendment purposes. The court explained that the odors emanating from cars or lockers are left open to public perception. Their examination poses little threat of embarrassment or discomfort to innocent students. Officials are free to use dogs to enhance their perception just as they are free to use binoculars to enhance their perception of objects left in plain sight. However, the examination of bodily odors is different, explained the court:

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[43] Massachusetts v. Snyder, 597 N.E.2d 1363 (Mass. 1992).

[44] Pennsylvania v. Cass, 709 A.2d 350 (Pa. 1998).

[45] *See*, Massachusetts v. Carey, 554 N.E.2d 1199 (Mass. 1990); Isaiah B. v. Wisconsin, 500 N.W.2d 637 (Wis. 1993).

[46] *In re* S.C. v. State, 583 So.2d 188 (Miss. 1991).

[47] *In re* Adam, 697 N.E.2d 1100 (Ohio App. 1997).

[48] Zamora v. Pomery, 639 F.2d 662 (10th Cir. 1981); People v. Overton, 249 N.E.2d 366 (N.Y. 1969).

[49] United States v. Place, 462 U.S. 696 (1983).

[50] 690 F.2d 470 (5th Cir. 1982).

> [T]he intensive smelling of people, even if done by dogs, [is] indecent and demeaning. Most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell. In contrast, where the Supreme Court has upheld limited investigations of body characteristics not justified by individualized suspicion, it has done so on the grounds that the particular characteristic was routinely exhibited to the public. Intentional close proximity sniffing of the person is offensive whether the sniffer be canine or human. One can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person.
>
> We need only look at the record in this case to see how a dog's sniffing technique—i.e., sniffing around each child, putting his nose on the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive.

If a student voluntarily consents to a search, the Fourth Amendment imposes no constraints, whether the search is conducted by school officials or the police. However, waivers of constitutional rights are valid only when freely given by someone who fully comprehends the options.[51] This standard requires more than acquiescence or failure to resist; there is a strong presumption that an individual would not knowingly waive a constitutional right when doing so would reveal evidence of wrongdoing. The court in *Tarter v. Raybuck,*[52] phrased the doctrine as follows:

> We are not convinced that David Tarter knowingly and intelligently waived his constitutional rights when he "consented" to be searched, and we are inclined to resolve this case on the basis of consent. The burden would be upon defendants to demonstrate such a voluntary relinquishment of constitutional rights by plaintiff. There is a presumption against the waiver of constitutional rights. That he may have acquiesced in the initial search does not necessarily demonstrate the relinquishment of his rights to challenge his initial search. In fact, David Tarter's testimony was that he only submitted to the search because he was afraid. Furthermore, there is no indication he even was aware that he might have had a constitutional right to object to a search.

Thus, the student who empties pocket or purse after being ordered to do so has not consented to the search. Nor would consent be seen as voluntary if school officials use tactics of intimidation or coercion: "If you agree to empty your pockets, I won't call the police." The best policy, then, is never to search students on the basis of their consent alone but only when the criteria set down in *New Jersey v. T.L.O.*[53] (explained later in this section) are met.

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[51] Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985).
[52] 742 F.2d 977 (6th Cir. 1984).

In *Webb v. McCullough*,[54] the Sixth Circuit held that school officials are not limited by the Fourth Amendment when chaperoning school-sponsored trips with parental consent. In this situation the authority of school officials was found to be analogous to that of parents who have wide latitude to search their children. It is probable that not all courts would reach the same conclusion. In *Kuehn v. Renton School District No. 403*,[55] the court prohibited the searching of the luggage of all members of a band as a precondition for participation in a concert trip.

The objections students raise to school searches are typically prompted by a desire to invoke the exclusionary rule. The **exclusionary rule** requires the suppression of evidence seized in violation of Fourth Amendment guidelines.[56] The courts are in general, but not unanimous, agreement that evidence illegally seized by school officials may not be used against students in a criminal or juvenile delinquency hearing.[57] Courts are split regarding whether the exclusionary rule applies in school disciplinary hearings.[58] The highest court in New York ruled that a weapon discovered in a student's possession by an illegal search and thus excluded from use in a juvenile delinquency hearing could nevertheless be used in a school disciplinary proceeding.[59]

Another motivation for objecting to searches is that a federal statute[60] makes it possible for students to seek monetary damages from school officials who violate their Fourth Amendment or other constitutional rights.[61] In theory, monetary damages are possible against both the school district and the offending officials personally, but in practice damages have proved difficult to obtain (see sec. 12.9).[62]

Determining whether an investigation by a school official constitutes a search is only the first step in determining whether the investigation is permissible. The Fourth Amendment prohibits only "unreasonable" searches, so the question is: Under what circumstances are searches of students by school officials reasonable? After many years of conflicting lower court decisions, the Supreme Court addressed this question in 1985 in *New Jersey v. TLO*.

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[53] 469 U.S. 325 (1985); see p. 151.

[54] 828 F.2d 1151 (6th Cir. 1987).

[55] 694 P.2d 1078 (Wash. 1985).

[56] Mapp v. Ohio, 367 U.S. 643 (1961).

[57] People v. Scott D., 315 N.E.2d 466 (N.Y. 1974); *but see*, State v. Young, 216 S.E.2d 586 (Ga. 1975).

[58] Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996); James v. Unified Sch. Dist. No. 512, 899 F. Supp. 530 (D. Kan. 1995); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980); Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976).

[59] Matter of Juan C. v. Cortines, 679 N.E.2d 1061 (N.Y. 1997).

[60] 42 U.S.C. § 1983.

[61] Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

[62] Jenkins v. Talladaga City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) (en banc), *cert. denied*, 139 L.Ed.2d 315 (1997).

NEW JERSEY v. T.L.O.

Supreme Court of the United States, 1985
469 U.S. 325

Justice White delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I.

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N. J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County. Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, it held that

> a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.

Applying this standard, the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T.LO. had violated the rule forbidding smoking in the lavatory. Once the purse was open, evidence of marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T.L.O.'s drug-related activities. . . .

The New Jersey Supreme Court agreed with the lower courts that the Fourth Amendment applies to searches conducted by school officials. The court also rejected the State of New Jersey's argument that the exclusionary rule should not be employed to prevent the use in juvenile proceedings of evidence unlawfully seized by school officials. Declining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value, the court held simply that the precedents of this Court establish that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."

With respect to the question of the legality of the search before it, the court agreed with the Juvenile Court that a warrantless search by a school official does not violate the Fourth Amendment so long as the official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." However, the court, with two justices dissenting, sharply disagreed with the Juvenile Court's conclusion that the search of the purse was reasonable. According to the majority, the contents of T.L.O.'s purse had no bearing on the accusation against T.L.O., for possession of cigarettes (as opposed to smoking them in the lavatory) did not violate school rules, and a mere desire for evidence that would impeach T.L.O.'s claim that she did not smoke cigarettes could not justify the search. Moreover, even if a reasonable suspicion that T.L.O. had cigarettes in her purse would justify a search, Mr. Choplick had no such suspicion, as no one had furnished him with any specific information that there were cigarettes in the purse. Finally, leaving aside the question whether Mr. Choplick was justified in opening the purse, the court held that the evidence of drug use that he saw inside did not justify the extensive "rummaging" through T.L.O.'s papers and effects that followed. . . .

Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question. Having heard argument on the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.*

II.

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials. . . .

[H]owever, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.

It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities. . . . As we observed in *Camara v. Municipal Court*, 387 U.S. 523 [1966], "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." . . .

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. Teachers and school administrators, it is said, act in loco parentis in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.

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*In holding that the search of T.L.O.'s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case. Thus, our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment. If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

III.

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." A search of a child's person or of a closed purse or other bag carried on her person,** no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." . . . The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. Both premises are severely flawed.

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administra-

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**We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies. Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials. . . .

tors in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. . . .

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. . . .

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable. . . . Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official*** will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.**** Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV.

There remains the question of the legality of the search in this case. We recognize that the "reasonable grounds" standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness. Our

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***We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question. *Cf. Picha v. Wilgos*, 410 F. Supp. 1214, 1219–1221 (N.D. Ill. 1976) (holding probable cause standard applicable to searches involving the police).

****We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." Because the search of T.L.O.'s purse was based on an individualized suspicion that she had violated school rules, we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.

review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T.L.O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. Second, even assuming that a search of T.L.O.'s purse might under some circumstances be reasonable in light of the accusation made against T.L.O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T.L.O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had "a good hunch."

Both these conclusions are implausible. T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T.L.O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T.L.O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T.L.O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation. Thus, if Mr. Choplick in fact had a reasonable suspicion that T.L.O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation.

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. . . . [T]he requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . ."*****

Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is

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*****T.L.O. contends that even if it was reasonable for Mr. Choplick to open her purse to look for cigarettes, it was not reasonable for him to reach in and take the cigarettes out of her purse once he found them. Had he not removed the cigarettes from the purse, she asserts, he would not have observed the rolling papers that suggested the presence of marihuana, and the search for marihuana could not have taken place. T.L.O.'s argument is based on the fact that the cigarettes were not "contraband," as no school rule forbade her to have them. Thus, according to T.L.O., the cigarettes were not subject to seizure or confiscation by school authorities, and Mr. Choplick was not entitled to take them out of T.L.O.'s purse regardless of whether he was entitled to peer into the purse to see if they were there. Such hairsplitting argumentation has no place in an inquiry addressed to the issue of reasonableness. If Mr. Choplick could permissibly search T.L.O.'s purse for cigarettes, it hardly seems reasonable to suggest that his natural reaction to finding them—picking them up—could be a constitutional violation. We find that neither in opening the purse nor in reaching into it to remove the cigarettes did Mr. Choplick violate the Fourth Amendment.

unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is reversed.

[A concurring opinion, an opinion concurring in the judgment, and two opinions concurring in part and dissenting in part were filed.]

* * *

Declining to view school administrators as analogous to either parents or police for Fourth Amendment purpose, *T.L.O.* limits searches to the following situations: A **school official** must have **reasonable grounds** to believe that a search of a **specific individual** will produce **relevant evidence** that the individual has violated a **specific school rule or law**. *T.L.O.* also places limits on the **scope** or nature of the search.

The *T.L.O.* criteria apply only to searches by school officials, not to searches by the police. Police, even when they come to school, must conform their searches to a different standard. (On the issue of school searches that also have some degree of police involvement, see *Cason v. Cook*.[63])

School officials may search only on the basis of reasonable grounds. Officials must have evidence that makes it reasonable to believe that the search is likely to be fruitful. Although it is impossible to state a precise definition of reasonable grounds, courts are unlikely to accept vague suspicion unsupported by evidence pointing to a specific act of wrongdoing. Thus, in *Matter of Pima County Juvenile Action*,[64] a student was seen near bleachers where students congregated for various reasons including drug use. The student previously had been mentioned in a staff meeting in a discussion of drug use, but the principal had no personal knowledge regarding the student's conduct, no prior reports of drug use or sale, and no other reason to suspect he had drugs in his pockets. The court concluded that the principal did not have reasonable grounds to search the student. However, in a similar case, a search of two boys found without passes in a restroom known as a haven for drug use and sale was upheld.[65] One court upheld as reasonable a search based on information supplied by a student who witnessed a criminal act by another student.[66] Another declared that information supplied by a student informant may be the basis for a search "[a]bsent information that a particular student informant may be untrustworthy."[67]

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[63] 810 F.2d 188 (8th Cir. 1987); *see also*, Martens v. District No. 220, 620 F. Supp. 29 (N.D. Ill. 1985).

[64] 733 P.2d 316 (Ariz. Ct. App. 1987).

[65] *In re* Bobby B., 218 Cal. Rptr. 253 (Ct. App. 1985).

[66] New Mexico v. Michael G., 748 P.2d 17 (N.M. Ct. App. 1987).

The reasonable grounds or suspicion must be directed at the specific individual or individuals to be searched. Although *T.L.O.* itself says nothing about sweep searches of all students in the hope of turning up incriminating evidence, other courts have declared this practice impermissible.[68] The requirement of individualized suspicion is enforced with the greatest vigor in connection with strip searches. The more intrusive the search, the more likely that the courts will insist that school officials have good reasons to suspect the student.[69] The Sixth Circuit allowed a strip search based on a tip from an informant only after the court had satisfied itself that the school official had questioned the informant to make sure the tip was not motivated by malice.[70]

The point of the search must be to uncover relevant evidence that would help to establish that a student did in fact violate a specific school rule or law. In *T.L.O.*, the search began with a view toward showing that T.L.O. had smoked. In the process of that search, evidence of drug dealing came into plain view. This justified continuing the search, in effect a second search, for additional relevant evidence of drug use or drug dealing. Note, however, that even a strong suspicion that a student had phoned in a false bomb threat would not justify a search of the student's pockets.

In *Cales v. Howell Public Schools*,[71] a security guard caught a student ducking behind cars in the school parking lot. The student also gave a false name when questioned. In finding the search in this case illegal the court wrote:

> It is clear that plaintiff's conduct created reasonable grounds for suspecting that some school rule or law had been violated. . . . Plaintiff's conduct was clearly ambiguous. It could have indicated that she was truant, or that she was stealing hubcaps, or that she had left class to meet a boyfriend. In short, it could have signified that plaintiff had violated any of an infinite number of laws or school rules. This Court does not read *TLO* so broadly as to allow a school administrator the right to search a student because that student acts in such a way so as to create a reasonable suspicion that the student has violated *some* rule or law.

Even if the search is justified at its inception, *T.L.O.* places limits on the scope of the search. For example, it is doubtful that a strip search of T.L.O. would have been justified. In another case, a school official had reasonable grounds to believe a student was carrying a knife. He opened the student's purse and, not seeing the knife, proceeded to also open a small zippered pocket inside the purse which had no bulge in it. He felt inside the pocket, found no knife but felt a plastic bag, which he could feel contained no knife. Nevertheless he removed the bag, which contained rock cocaine. The court ruled that the scope of this search exceeded the *T.L.O.* guidelines: "While school safety may readily justify a basic search for weapons, the student's interest in privacy should preclude a scavenger hunt after the basic search has produced no weapons. . . . These drugs were discovered during a search extended by simple curiosity rather than suspicion."[72]

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[67] In the Interest of S.C. v. Mississippi, 583 So. 2d 188 (Miss. 1991).

[68] Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); Kuehn v. Renton Sch. Dist. No. 403, 694 P.2d 1078 (Wash. 1985); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); *but see*, Des Roches v. Caprio, 156 F.3d 571 (4th Cir. 1998).

[69] Kennedy v. Dexter Consol. Sch., 955 P.2d 693 (N.M. Ct. App. 1998); Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993).

[70] Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).

[71] 635 F. Supp. 454 (E.D. Mich. 1985).

Following *T.L.O.*, courts will insist that the scope of a school search not be excessive in light of the age and sex of the student searched and, most importantly, the nature of the infraction suspected. In one case, the Supreme Court of West Virginia held that a strip search of a student suspected of stealing $100.00 was excessive in light of the nature of the crime being investigated. Even though the money was found in the student's underwear, the court said that the student's "suspected conduct did not pose the type of immediate danger to others that might conceivably necessitate and justify a warrantless strip search."[73] Similarly, another court concluded that strip searching two eight year olds twice to find $7 that was allegedly stolen was unreasonable. "*T.L.O.*," said the court, "forbids school officials from undertaking the most intrusive of searches where the infraction is relatively minor and presents no threat of imminent danger. . . ."[74] However, the Seventh Circuit ruled in favor of school officials who strip searched a sixteen-year-old student who was perceived to have an unusual bulge in the crotch and whose name had been associated several times with drug dealing and use.[75]

Heightened concern over the dangers posed by student possession of weapons and use of drugs at school has led some to ask whether relatively nonintrusive searches might be undertaken without particularized suspicion. It might be argued, for example, that the minor intrusion of a required examination by a metal detector or of the contents of backpacks is justified by the need to protect the safety of students and teachers. The few courts that have considered the constitutionality of these searches have upheld them, noting the need to achieve a safe school, the nondiscriminatory nature of the searches, and the minimal infringement of the students' privacy.[76]

Similarly, random drug testing might be justified in situations where drug use is especially prevalent or dangerous and where the purpose of the testing is to assist rather than to punish the students. The Supreme Court considered the constitutionality of a school's program of mandatory drug testing for athletes in the following case.

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[72] T.J. v. State, 538 So.2d 1320 (Fla. Dist. Ct. App. 1989).

[73] West Virginia *ex rel.* Galford v. Mark Anthony B., 433 S.E.2d 41 (W.Va. 1993).

[74] Jenkins v. Talladega City Bd. of Educ., 95 F.3d 1036 (11th Cir. 1996).

[75] Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993).

[76] In Interest of S.S., 680 A.2d 1172 (Pa. Super. Ct. 1996); In Interest of F.B., 658 A.2d 1378 (Pa. Super. Ct. 1995); New York v. Dukes, 580 N.Y.S.2d 850 (Crim. Ct. 1992); Illinois v. Pruitt, 662 N.E.2d 540 (Ill. App. Ct. 1996).

VERNONIA SCHOOL DISTRICT 47J v. ACTON

Supreme Court of the United States, 1995
515 U.S. 646

Justice Scalia delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture. This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. . . .

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. . . .

At that point, District officials began considering a drug-testing program. . . . The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. . . . The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

In the fall of 1991, respondent James Acton, then a seventh-grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution . . . After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. The United States Court of Appeals for the Ninth Circuit reversed . . .

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ..."

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant; warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

We have found such "special needs" to exist in the public-school context. There, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, " 'the Fourth Amendment imposes no irreducible requirement of such suspicion,' " . . .

The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-á-vis the State may depend upon the individual's legal relationship with the State. . . . Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians . . .

In *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,' " and is inconsistent with our prior decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," we have acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," with the power and indeed the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of those rights is what is appropriate for children in school. . . .

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. . . Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally."

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. . . .

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam. James testified that this included the giving of a urine sample. . . .

Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We [have recognized in previous cases] that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function. . . .

Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. In [previous cases], we characterized the government interest motivating the search as "compelling." . . . It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest which appears *important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . School years are the time when the physical, psychological, and addictive effects of drugs are most severe. . . . Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. . . .

As for the immediacy of the District's concerns: We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached 'epidemic proportions,' " and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." . . .

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. . . .

Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.

We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care. . . . [W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. . . .

[W]e conclude that in the present case it is.

We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this district-wide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

* * *

That the random drug testing program considered in *Vernonia* was judged acceptable should not be taken to mean that random drug testing of athletes is always constitutional. The Court noted in the opinion that the district had "observed a sharp increase in drug use and . . . disciplinary problems," and that "student athletes were leaders of . . . the drug culture." Whether the Court would have approved the drug testing program had there not been a significant problem is unknown. Similarly, the opinion notes with approval that the school board adopted the program following a period of public commentary and only after less intrusive methods, such as drug education, had failed. Again it is not known whether these measures are always required. It does seem reasonably clear, however, that the Court would not have approved the program had the tests been conducted in a more intrusive manner or had their purpose been punitive rather than helpful. The Court noted with approval that students were afforded privacy when providing urine samples, that the confidentiality of samples and of test results was scrupulously protected, that the tests looked only for drug use, and that those who tested positive were not reported to a law enforcement agency nor even necessarily dismissed from the team.

Vernonia does not decide the issue of whether random drug testing might be extended either to all students participating in extracurricular activities or even to all students generally. Because the Court stressed that those participating in athletics already have a lowered expectation of privacy, perhaps the decision applies only to athletes. Yet the Court also mentioned that the school's relationship to its students is both "custodial" and "tutelary" suggesting that a random drug testing system was justified not just to preserve the safety of athletic activities but also to educate. To the extent that generalized drug testing is viewed by the courts as an educational endeavor it may be permissible for students other than athletics. The same reasoning might also apply to programs requiring all students to pass through metal detectors before entering school.

The Seventh Circuit took this approach in upholding a school's policy of conditioning the opportunity to participate in extracurricular activities or to drive to school on agreeing to submit to random, unannounced urinalysis examinations for drugs, alcohol, and tobacco. If a test was positive the student and parent were informed and permitted to offer an explanation, such as that the student was on a medication that led to the positive test. The student could also ask to be retested. Absent a satisfactory explanation or retest, the student was barred from extracurricular activities or driving to school. Also, the student and parent would be provided with the names of agencies that might assist in helping the student become drug free. No disciplinary action was taken. In upholding this policy the court noted that it was undertaken by the school in its role as tutor of its students, not to punish them. The court also considered the special nature of extracurricular activities and the benefits they entail.[77]

5.4 THE ADJUDICATION OF GUILT

In U.S. society the judgment of people accused of crimes is guided by certain fundamental principles. The process begins with a presumption of innocence and the government bearing the burden of proving guilt. Whatever the accusation, the defendant has the right to a fair and impartial trial. Extensive procedural safeguards and rules of evidence maximize the likelihood of a just verdict while respecting basic human rights and dignity. Even when a person is found guilty, the Constitution places limits on permissible punishments, no matter what the crime.

These same principles apply to government-controlled, noncriminal accusatory proceedings like school disciplinary actions. Both the Constitution and state statutes impose procedural and substantive requirements designed to ensure fairness and minimize error. Although they vary somewhat, state statutes generally incorporate and in some cases expand on the constitutional rights discussed later. States are free to grant accused students more procedural safeguards than the Constitution requires, but never fewer. (See also sec. 7.3 regarding federal statutes that regulate the disciplining of disabled students.)

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[77] Todd v. Lyskowinski, 133 F.3d 984 (7th Cir. 1998), *cert. denied*, 142 L.Ed.2d 53 (1998).

The **Due Process Clause** of the Fourteenth Amendment says that the state shall not "deprive any person of life, liberty, or property without due process of law." Although the concept of due process has never been fully defined, it embodies a philosophy of justice that requires even-handed deliberation prior to acting. In its procedural sense, due process means the right to be heard. At the minimum, it requires that individuals not be punished or deprived of their rights by the state without first being given a chance to tell their side of the story. Another important due process principle is that the greater the contemplated punishment, the more extensive procedures necessary to guard against an unjust verdict.

Historically, public schools had broad authority to discipline students unfettered by due process requirements. In the early 1960s, federal courts began to require some due process for students expelled from public schools.[78] By the early 1970s, most, but not all, federal courts were applying the Due Process Clause to all cases of exclusion from school, although the terms of the requirements varied considerably from court to court. The law was particularly unsettled with regard to suspensions of short duration. The following Supreme Court case did much to clarify the issue.

GOSS v. LOPEZ

Supreme Court of the United States, 1975

419 U.S. 565

Mr. Justice White delivered the opinion of the Court.

This appeal by various administrators of the Columbus, Ohio, Public School System (CPSS) challenges the judgment of a three-judge federal court, declaring that appellees—various high school students in the CPSS—were denied due process of law contrary to the command of the Fourteenth Amendment in that they were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter, and enjoining the administrators to remove all references to such suspensions from the students' records.

I.

Ohio law, Rev. Code Ann. § 3313.64 (1972), provides for free education to all children between the ages of six and 21. Section 3313.66 of the Code empowers the principal of an Ohio public school to suspend a pupil for misconduct for up to 10 days or to expel him. In either case, he must notify the student's parents within 24 hours and state the reasons for his action. A pupil who is expelled, or his parents, may appeal the decision to the Board of Education and in connection therewith shall be permitted to be heard at the board meeting. The Board may reinstate the pupil following the hearing. No similar procedure is provided in § 3313.66 or any other provision of state law for a suspended student. Aside from a regulation tracking the statute, at the time of the imposition of the suspensions in this case the CPSS itself had not issued any written procedure applicable to suspensions. Nor, so far as the record reflects, had any of the individual high schools involved in this case. Each, however, had formally or informally described the conduct for which suspension could be imposed.

The nine named appellees, each of whom alleged that he or she had been suspended from public high school in Columbus for up to 10 days without a hearing pursuant to § 3313.66, filed an action under 42 U.S.C. § 1983 against the Columbus Board of

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[78] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

Education and various administrators of the CPSS. The complaint sought a declaration that § 3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to enjoin the public school officials from issuing future suspensions pursuant to § 3313.66 and to require them to remove references to the past suspensions from the records of the students in question.

The proof below established that the suspensions arose out of a period of widespread student unrest in the CPSS during February and March 1971. Six of the named plaintiffs, Rudolph Sutton, Tyrone Washington, Susan Cooper, Deborah Fox, Clarence Byars, and Bruce Harris, were students at the Marion-Franklin High School and were each suspended for 10 days on account of disruptive or disobedient conduct committed in the presence of the school administrator who ordered the suspension. . . .

Two named plaintiffs, Dwight Lopez and Betty Crome, were students at the Central High School and McGuffey Junior High School, respectively. The former was suspended in connection with a disturbance in the lunchroom which involved some physical damage to school property. Lopez testified that at least 75 other students were suspended from his school on the same day. He also testified below that he was not a party to the destructive conduct but was instead an innocent bystander. Because no one from the school testified with regard to this incident, there is no evidence in the record indicating the official basis for concluding otherwise. Lopez never had a hearing.

Betty Crome was present at a demonstration at a high school other than the one she was attending. There she was arrested together with others, taken to the police station, and released without being formally charged. Before she went to school on the following day, she was notified that she had been suspended for a 10-day period. Because no one from the school testified with respect to this incident, the record does not disclose how the McGuffey Junior High School principal went about making the decision to suspend Crome, nor does it disclose on what information the decision was based. It is clear from the record that no hearing was ever held.

There was no testimony with respect to the suspension of the ninth named plaintiff, Carl Smith. The school files were also silent as to his suspension, although as to some, but not all, of the other named plaintiffs the files contained either direct references to their suspensions or copies of letters sent to their parents advising them of the suspension.

On the basis of this evidence, the three-judge court declared that plaintiffs were denied due process of law because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that Ohio Rev. Code Ann. § 3313.66 (1972) and regulations issued pursuant thereto were unconstitutional in permitting such suspensions. It was ordered that all references to plaintiffs' suspensions be removed from school files. . . .

The defendant school administrators have appealed the three-judge court's decision. Because the order below granted plaintiffs' request for an injunction—ordering defendants to expunge their records—this Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1253. We affirm.

II.

At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). . . .

Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code Ann. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. It is true that § 3313.66 of the Code permits school principals to suspend students for up to 10 days; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. . . .

The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause.

A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspension may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

III.

"Once it is determined that due process applies, the question remains what process is due." We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." . . .

There are certain bench marks to guide us, however. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), a case often invoked by later opinions, said that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." "The fundamental requisite of due process of law is the opportunity to be heard," a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."

It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. . . .

We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. . . . Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. . . .

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

IV.

The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is affirmed.

[Powell filed a dissenting opinion, joined by Burger, Blackmun, and Rehnquist.]

* * *

Goss resolved the major questions concerning the application of the Due Process Clause in public schools. Any nontrivial deprivation of a student's liberty or property interests requires due process. Liberty interests include freedom from restraint and, as in *Goss*, the maintenance of one's reputation. Property interests can arise by ownership or by state action as when statutes grant the right to attend public school. Because deprivation of even one day of schooling is "a serious event in the life of the suspended child," and therefore not trivial, suspensions of any length require due process.

Once it has been determined that due process applies in a particular case, it becomes necessary to determine what process is due. *Goss* indicates that, except under emergency circumstances, a hearing should precede a child's exclusion from school. For short-term suspensions, defined by the court as ten days or less, *Goss* requires notice of the charges and case against the student followed by an opportunity to refute them. Little time need elapse between the student's notification of the alleged violation and the hearing. For example, an accusing teacher might notify a student of alleged misconduct and immediately accompany the student to the school office where the principal listens to teacher and student, makes a judgment, and, if necessary, assigns a suspension of ten days or less. There are not any specific procedural requirements about where or how the hearing is to be conducted. One court ruled that the hearing requirement was satisfied when a principal spoke to a disruptive student and then to her parent on the telephone after the student had been removed from school.[79] Thus, *Goss* attempts to accommodate both the student's right to fair treatment and the school's need to act quickly without undue expenditure of resources.

Although *Goss* provides the framework for applying the Due Process Clause to school disciplinary cases, as always the lower courts have needed to resolve a variety of specific issues. These issues fall into four groups: besides short-term suspension, what punishments require due process or can be given without a hearing; are suspensions without hearing ever permissible; under what circumstances may a hearing be held after exclusion from school rather than before; and when punishment goes beyond short-term suspension, what additional procedures are required.

Most courts do not require hearings for punishments that do not involve exclusion from school. Other punishments are either not considered deprivations of liberty or property or are considered trivial. For example, in

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[79] C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996).

Dickens v. Johnson County Board of Education,[80] temporary placement in a "time out" area was considered too inconsequential to trigger due process. Although students have a statute-given property right to a public education, they have no property right to any of its components. Thus, courts have said that denying a student a place on an extracurricular sports team, a role in a play, a place in the band, or admission to the academic honor society or an advanced placement course does not require a hearing.[81] Other courts have denied the due process claims of students whose grades were reduced for academic (as opposed to disciplinary) reasons[82] or who were prohibited from attending graduation ceremonies.[83] The Supreme Court itself has ruled that no hearing is required prior to corporal punishment.[84]

On the other hand, courts may require due process for punishments that entail a significant decrease in the opportunity to learn or diminish a student's future prospects even if no actual suspension is involved. This is particularly likely when, for disciplinary reasons, students are deprived of significant benefits to which they are otherwise entitled. In *Cole v. Newton Special Municipal Separate School District*,[85] the court ruled that a hearing was required for in-school suspension because the student was deprived of instruction. In *Warren v. National Association of Secondary School Principals*,[86] the court mandated a hearing for a student expelled from the National Honor Society. In *State ex rel. Yarber v. McHenry*, the court ruled that grade reduction for disciplinary reasons, such as failure to comply with the school's attendance policy, requires due process.[87]

The only situation in which the courts seem willing to allow suspension without a hearing is when the student freely admits guilt. Confession can be seen either as a waiver of the right to a hearing or as demonstrating that there is no practical need for one.[88]

The Court in *Goss* suggested that there were occasions when a student could be suspended with notice and hearing to follow "as soon as practicable": Students "whose presence poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process may be immediately removed from the school." Although not much litigation has addressed this point, the exception appears to apply best to violent or destructive students unwilling or unable to control themselves long enough to participate in a brief hearing. In *White v. Salisbury Township School*

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[80] 661 F. Supp. 155 (E.D. Tenn. 1987).

[81] Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Mazevksi v. Horseheads Cent. Sch. Dist., 950 F. Supp. 69 (W.D.N.Y. 1997); Hebert v. Ventetuolo, 638 F.2d 5 (1st Cir. 1981); Bernstein v. Menard, 557 F. Supp. 90 (E.D. Va. 1982), *appeal dismissed*, 728 F.2d 252 (4th Cir. 1984); *but see*, Duffley v. New Hampshire Interscholastic Athletic Ass'n, 446 A.2d 462 (N.H. 1982).

[82] Campbell v. Board of Educ. of New Milford, 475 A.2d 289 (Conn. 1984).

[83] Dolinger v. Driver, 498 S.E.2d 252 (Ga. 1998); Swany v. San Ramon Valley Unified Sch. Dist., 720 F. Supp. 764 (N.D. Cal. 1989); Fowler v. Williamson, 448 F. Supp. 497 (W.D.N.C. 1978).

[84] Ingraham v. Wright, 430 U.S. 651 (1977).

[85] 676 F. Supp. 749 (S.D. Miss. 1987) *aff'd*, 853 F.2d 924 (5th Cir. 1988).

[86] 375 F. Supp. 1043 (N.D. Tex. 1974).

[87] 915 S.W.2d 325 (Mo. 1995) (en banc).

[88] Keough v. Tate County Bd. of Educ., 748 F.2d 1077 (5th Cir. 1984); Coffman v. Kuehler, 409 F. Supp. 546 (N.D. Tex. 1976).

District,[89] the court agreed with the school district that a police accusation of smoking marijuana on school grounds justified a suspension prior to a hearing. The decision is hard to understand, because after they learned of the infraction from the police, school officials told the student he could remain in school for the rest of the day but was not to report to classes the next day, with the hearing to follow.

The wording of the *Goss* opinion indicates that school disciplinary procedures must conform to the general due process doctrine that more severe punishments require more elaborate procedures. Lower courts have unanimously interpreted *Goss'* focus on suspensions of ten days or less as signaling that more extensive due process is required prior to long-term suspension or expulsion. However, there is nothing approaching unanimity concerning what specific procedures are mandated. The following district court case, decided a few years after *Goss*, illustrates the variety of due process claims that can be raised in connection with long-term exclusion from school.

GONZALES v. McEUEN

United States District Court, Central District of California, 1977
435 F. Supp. 460

Takasugi, District Judge.

Eleven high school students, by their next friends, have brought this action under the Civil Rights Act, 42 U.S.C. § 1983, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The case stems from the suspension and expulsion of the named plaintiffs from Oxnard Union High School following a period of student unrest on campus during October 14–15, 1976. The plaintiffs were charged with having committed certain acts which, it was alleged, led to a riot at Oxnard High School. . . .

[P]laintiffs contend that their expulsions were violative of due process and they seek a preliminary injunction directing their reinstatement at Oxnard High school pending trial or, alternatively, pending hearing and determination by the Ventura County Board of Education.

COMMON ISSUES

California Education Code Section 10605

Plaintiffs contend that their rights to due process have been violated by the defendants' failure to attempt milder measures of correction before imposing the harsher penalty of expulsion. California Education Code, § 10605, reads as follows:

> The governing Board of any school district shall suspend or expel pupils for misconduct when other means of correction fail to bring about proper conduct.

Plaintiffs' interpretation of § 10605 is that the exercise of the power of expulsion or suspension is expressly limited to cases where other means to correct misconduct have failed; an attempt at milder measures of correction is a condition precedent to expulsion. Defendants, on the other hand, point to numerous other sections of the Education Code which unquestionably authorize expulsions and suspensions and contain no reference to other corrective and less harsh action. The defendants offer extreme illustrations to demonstrate the error of plaintiffs' reasoning. The defendants interpret § 10605 as requiring expulsion when other means have failed.

The court need not, and does not, reach this issue of statutory interpretation. Plaintiffs' theory is that the failure to follow the quoted provisions of § 10605 of the California Education Code constitutes a violation of due process. The court disagrees. Not every violation of state statute or a school board's procedural requirement is a denial of due process. The defendants' failure to follow the procedure suggested by the plaintiffs would be a violation of state law only. Plaintiffs are not thereby deprived of any federal right. Title 42, U.S.C. § 1983 is not concerned with violations of state law unless such violations result in an infringement of a federally protected right.

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[89] 588 F. Supp. 608 (E.D. Pa. 1984).

Impartiality of the Board

Plaintiffs' strongest and most serious challenge is to the impartiality of the Board. They contend that they were denied their right to an impartial hearing before an independent fact-finder. The basis for this claim is, first, overfamiliarity of the Board with the case; second, the multiple role played by defendants' counsel; and, third, the involvement of the Superintendent of the District, Mr. McEuen, with the Board of Trustees during the hearings.

No one doubts that a student charged with misconduct has a right to an impartial tribunal. There is doubt, however, as to what this means. Various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Bias is presumed to exist, for example, in cases in which the adjudicator has a pecuniary interest in the outcome; or in which he has been the target of personal attack or criticism from the person before him. The decisionmaker may also have such prior involvement with the case so as to acquire a disqualifying bias. The question before the Court is not whether the Board was actually biased, but whether, under the circumstances, there existed probability that the decisionmaker would be tempted to decide the issues with partiality to one party or the other. It is with this view that the plaintiffs' claims must be considered.

Overfamiliarity

Much has been made of "The Red Book" which, it is claimed, contained information about the academic and disciplinary records of plaintiffs. It is alleged that the Board had access to this material from twenty to thirty days before the expulsion hearings. Depositions submitted to the court show that the members of the Board met with school officials prior to the hearings. Plaintiffs contend that this prior involvement by the Board deprived plaintiffs of the opportunity for a fair hearing. The court rejects this contention. Exposure to evidence presented in a nonadversary investigative procedure is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Nor is a limited combination of investigatory and adjudicatory functions in an administrative body necessarily unfair, absent a showing of other circumstances such as malice or personal interest in the outcome. A school board would be amiss in its duties if it did not make some inquiry to know what was going on in the district for which it is responsible. Some familiarity with the facts of the case gained by an agency in the performance of its statutory role does not disqualify a decisionmaker.

Multiple Roles of Counsel

Turning now to the issue of the multiple roles performed by defendants' counsel, the court notes that the Board members are defendants in this pending related action and may thereby become subject to personal liability.

It is undisputed that attorneys for the District who prosecuted the charges against the plaintiffs in the expulsion proceedings, also represent the Board members in this action. Plaintiffs claim that the attorneys acted in dual roles at the expulsion hearings: as prosecutors for the Administration and as legal advisors to the Board. Counsel for defendants admit that they advised the Board prior to the hearings with respect to its obligations regarding these expulsions, but they deny that they advised the Board during the proceedings themselves.

A reading of the transcripts reveals how difficult it was to separate the two roles. Special mention should be made of the fact that the Board enjoys no legal expertise and must rely heavily upon its counsel. This places defendants' attorneys in a position of intolerable prominence and influence.

It is the opinion of this court that the confidential relationship between the attorneys for the District and the members of the Board, reinforced by the advisory role played by the attorneys for the Board, created an unacceptable risk of bias. Bearing in mind also that the Board members are subject to personal liability in this action, the court concludes that bias can be presumed to exist.

Involvement of Superintendent McEuen

Superintendent McEuen sat with the Board members during the expulsion hearings; he acted as Secretary to the Board on at least one occasion. By statute, Mr. McEuen is the chief advisor to the Board. The fact remains, however, that he is also the chief of the "prosecution" team, to wit, the District.

It is clear from the record that at least on one occasion, at the joint hearing of plaintiffs, Flores, Chavez and Rodriguez, Superintendent McEuen was present with the Board for approximately forty-five minutes during its deliberations on the issue of expelling these plaintiffs. The plaintiffs contend that their due process rights were violated by this involvement of Mr. McEuen with the Board. This court agrees.

Defendants' counsel maintain that Mr. McEuen did not participate in the deliberations and did no more, perhaps, than serve cookies and coffee to the Board members. Whether he did or did not participate, his presence to some extent might operate as an inhibiting restraint upon the freedom of action and expression of the Board. Defendants argue that there is no evidence that Mr. McEuen influenced or biased the Board. Proof of subjective reasoning processes are incapable of corroboration or disproval. Plaintiffs should not be forced to rely upon the memory or sense of fairness of Superintendent McEuen or the Board as to what occurred there. Perhaps Mr. McEuen's physical presence in deliberation becomes more offensive because of the pre-hearing comments which showed something less than impartiality.

The court concludes that the process utilized by the Board was fundamentally unfair. This raises a presumption of bias. In view of the alternatives for the selection of an impartial hearing body under California Education Code Section 10608, it would have been more reasonable to provide procedures that insured not only that justice was done, but also that it appeared to have been done.

In the ordinary case, the scope of judicial review of an administrative board's determination is limited to the question whether there is substantial evidence in the record to support the Board's findings. However, in light of this court's holding that there was a presumption of bias in this hearing, plaintiffs are entitled to this court's review of the evidence under the standard of "clear and convincing" proof.

DISCUSSION OF INDIVIDUAL STUDENTS

David Barrington and Charles Munden

NOTICE

Plaintiffs Barrington and Munden were expelled at a meeting of the Board on November 10, 1976. Neither Barrington nor Munden was present; neither was represented by either parent or counsel.

On October 29, 1976, letters had been sent to the parents advising them that the principal was recommending expulsion of the students. The letters contained a specific statement of the charges: in the case of Barrington, that he was involved in a riot at school at which time he had threatened physical violence against a teacher; in the case of Munden, that he was involved in a fight with another student, Wayne Berry. The letters contained no notice to the student or parent of the student's right to be present at the hearing, to be represented by counsel, and to present evidence. This was a clear violation of § 10608 of the California Education Code. The letters to the parents stated, "If you feel that the school does not have just cause for this recommendation, you may want to attend this meeting to present your reasons why [the students] should not be expelled."

Attorneys for Munden and Barrington, on November 19 and 20, respectively, requested that the Board set aside their expulsions on account of alleged inadequacy of the notices given to the plaintiffs. They asked for new hearings at which the plaintiffs could be present to defend themselves. The Board declined to set aside these expulsions or to admit that the notices sent to these plaintiffs were constitutionally defective. The defendants maintain that the notices sent to Barrington and Munden complied, at least, with federal due process which, it is urged, requires only a hearing and notice of the charges. They contend that since a hearing was held and there was notice to the parents of the charges against the student, the requisites of procedural due process were satisfied. The court disagrees.

The precise question concerning the content of the notice to be given in expulsion proceedings will depend on the nature of the proceeding that is required.

It is now beyond argument that due process protections apply to expulsion of students by public educational institutions. The prerogative of the educational institution to regulate student conduct, though concededly broad, must be exercised consistently with constitutional safeguards. The question here is common to almost every case in which it is claimed due process has been violated: "Once it is determined that due process applies, the question remains what process is due?"

The requirements of due process are flexible and different cases may require different procedural safeguards. If the possible penalties are mild, quite informal procedures may be sufficient. More formal proceedings may be required where severe penalties may attach. Where the cutoff is between a "severe" and a "mild" penalty is not clear; what is clear is that expulsion is by far the most severe.

The Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975) held that in suspensions of ten days or less due process requires at a minimum that a student be given notice and an opportunity to be heard. The court expressly refrained from construing due process to require, in short suspension situations, an opportunity to secure counsel, to confront and cross-examine witnesses, or to call witnesses. However, the court made clear that it was addressing itself solely to the short suspension, not exceeding ten days. It recognized that longer suspensions or expulsions may require more formal procedures.

Goss clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have, the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses.

Other courts have held that a hearing incorporating these safeguards must be held before or shortly after a child is suspended for a prolonged or indefinite period. *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973).

Notice to be adequate must communicate to the recipient the nature of the proceeding. In an expulsion hearing, the notice given to the student must include a statement not only of the specific charge, but also the basic rights to be afforded the student: to be represented by counsel, to present evidence, and to confront and cross-examine adverse witnesses. Section 10608 of the California Education Code provides, *inter alia*, for notice to the student and the parent of the specific charge, of the right to be represented by counsel, and of the right to present evidence. Federal due process requires no less.

Defendants next argue that even if the notice was defective, the court must still determine whether the plaintiffs were given a fair and impartial hearing. Defendants misapprehend the meaning of notice. It is not "fair" if the student does not know, and is not told, that he has certain rights which he may exercise at the hearing.

The court, in any event, has held that there was a presumption of bias and that plaintiffs did not have a fair and impartial hearing. In the case of plaintiffs Munden and Barrington, the unfairness inherent in the dual roles is readily apparent. Mr. Hines acted as the legal advisor to the Board during the Munden-Barrington hearing on November 10. When the request was made for new, properly noticed hearings for these two students, counsel, who advised the Board in the first proceeding, urged the Board to refuse.

The court holds that the notice given to plaintiffs Barrington and Munden was defective in that it did not adequately inform them of their constitutional rights. It follows that their expulsions were improper. . . .

Wayne Berry and Steve Gonzales

On October 15, 1976, Mr. Morimune, a teacher, saw a group of students running around. About ten students were chasing three others. Two of the three jumped over the fence. The third was making a valiant attempt, but, as Mr. Morimune put it, "There was about four gentlemen holding onto him." As Mr. Morimune drew near, he heard a cry for help. Sizing up the situation, he determined that the four were not really serious. Nevertheless, he threw himself upon the four, knocked them to the ground and, as everyone came up for air, Mr. Morimune grabbed two by the hair. These two were Steve Gonzales and Charles Munden. The young man, free at last, escaped over the fence. He was Wayne Berry. Charles Munden was taken to the principal's office so that he could give an account of himself. The interview was taped and a typed transcript was prepared.

Gonzales was charged with hurting Berry. Berry was charged with throwing an object at Munden, striking him on the leg.

WAYNE BERRY

The alleged victim, Munden, refused to testify for either the District or the students. Assistant Principal Hernandez testified that Munden had picked out Berry from about 800 photographs as the person who had thrown an object at him. Defendants claim that this hearsay is admissible as a spontaneous statement and admissible under California Evidence Code § 1240. Defendants further contended that since Munden was "unavailable" his taped statements implicating Berry and Gonzales are admissible as a declaration against interest. The Court rejects these arguments. The requisite element of spontaneity, which assures reliability, is clearly lacking. The rationale for permitting hearsay exceptions is that the declarant has no motive for falsifying. Here, Munden obviously does have such motive. Further, if the declaration against interest exception to the hearsay rule is advanced, only declarations against Munden's interests would be admissible.

The strongest reason, of course, for not permitting these hearsay statements is that the accused student is deprived of his constitutional right to confront and cross-examine his accuser. Although strict adherence to common law rules of evidence is not required in school disciplinary proceedings, where the student is faced with the severe sanction of expulsion, due process does not permit admission of ex parte evidence given by witnesses not under oath, and not subject to examination by the accused student. . . .

STEVE GONZALES

The expulsion of Steve Gonzales holds many of the same infirmities as Berry's. Vice-principal Hernandez testified again with respect to the hearsay statements of Berry and Munden, implicating Gonzales. For the reasons stated above, the court holds that admission of these hearsay statements without opportunity to cross-examine the defendant, in student expulsion proceedings, deprived the accused student of his rights of confrontation. . . .

Failure to Testify

At the hearing, on the advice of counsel, both Berry and Gonzales declined to testify.

Counsel for defendants argued that the plaintiffs' failure to take the stand without specific assertion of Fifth Amendment privileges constituted a waiver of the privilege against self-incrimination. They further argued that inasmuch as plaintiffs declined to testify, it can be assumed that their nonexistent testimony would have supported the charges against them. Therefore, defendants claim that plaintiffs' refusal to testify is equivalent to a confession and the prosecutor is free to comment thereon.

This argument does not take into account the basic reasons for the existence of the rights accorded under the Fifth Amendment.

In the landmark case of *Griffin v. California*, 380 U.S. 609 (1965), Mr. Justice Douglas recited the reasons for the protections of the Fifth Amendment:

> . . . [T]he Fifth Amendment . . . was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. . . .

In *Griffin*, the court held that comment upon the failure of a criminal defendant to take the stand, under California statute permitting such comment and an inference of guilt, violated the Fifth Amendment. This court holds, as did the District Court in *Caldwell v. Cannady*, 340 F. Supp. 835 (N.D. Tex. 1972):

> . . . one cannot be denied his Fifth Amendment right to remain silent merely because he is a student. Further, his silence shall under no circumstances be used against him as an admission of guilt. . . .

There is no question that a high school student who is punished by expulsion might well suffer more injury than one convicted of a criminal offense. The court holds that comment by counsel on the students' refusal to testify, and arguments that guilt could be inferred from such refusal was a violation of the students' Fifth Amendment rights. . . .

The Board's decision for expulsion of plaintiffs Barrington, Munden, Flores, Berry and Gonzales is hereby set aside. Defendants are ordered to reinstate said plaintiffs and provide special or remedial measures to permit plaintiffs to make up work missed by reason of the involuntary expulsion. This order of reinstatement shall become effective forthwith and shall continue until one of the following occurs:

1. Final decision following a hearing before an impartial body, or
2. Final decision by the Ventura County Board of Education on the appeals filed by plaintiffs with said Board.

* * *

It is important to remember that due process requirements are not directly related to the seriousness of the student's misconduct; rather the requirements are determined by the nature and weight of the contemplated punishment. Any punishment that is by nature a deprivation of liberty or property creates a need for some procedural due process. The greater the weight of the contemplated deprivation, the more due process required. Thus, using a series of short-term suspensions for the same offense is not a permissible way to avoid the more extensive due process of long-term suspension.

However, courts generally judge the weight of a suspension by its length, not by the severity of its impact. For example, in *Lamb v. Panhandle Community United School District No. 2*,[90] a student was suspended for the last three days of the school year. As a result, he missed final examinations, failed three courses, and could not graduate. The student claimed that he should have been afforded extensive due process because of the great effect the punishment had on his life. The court disagreed and ruled that a suspension of three days was short-term regardless of when it occurred.[91]

Courts are in agreement that exclusion from school for more than ten days requires formal notice of specific charges. The notice should specify the time and place of the hearing far enough in advance to permit preparation of a defense.[92] The hearing itself should be before an impartial tribunal, which may be and often is the board of education itself.[93] The accused student should have the opportunity to present evidence and refute adverse evidence.[94] A finding of guilt must be based on substantial evidence with the district bearing the burden of proof. Less demanding than the "beyond a reasonable doubt" standard used in criminal proceedings, substantial evidence requires a showing that guilt is more likely than innocence or, as one court put it, "such relevant proof as adequate to support a conclusion of ultimate fact."[95] To suspend a student based on an unreliable drug test would violate this requirement.[96]

The following issues of due process for long-term suspension must be viewed as unsettled because courts have taken conflicting positions:

- The provision of a list of witnesses prior to the hearing. The majority of the courts have held that this is not required.[97]
- The right to confront and question adverse witnesses. A number of courts permit testimony in the form of anonymous affidavits but others do not.[98]
- The admissibility of hearsay with most courts permitting it.[99]
- Whether impartiality is compromised when the school board's own attorney presents the case against the student. The courts are about evenly split on this question.[100]

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[90] 826 F.2d 526 (7th Cir. 1987).

[91] *See also*, Keough v. Tate County Bd. of Educ., 748 F.2d 1077 (5th Cir. 1984).

[92] Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975); *but see*, Walker v. Bradley, 320 N.W.2d 900 (Neb. 1982).

[93] Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071 (5th Cir. 1973).

[94] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[95] Mandell v. Board of Educ., 662 N.Y.S.2d 598 (App. Div. 1997); Washington v. Smith, 618 N.E.2d 561 (Ill. App. Ct. 1993).

[96] Anable v. Ford, 653 F. Supp. 22 (W.D. Ark.), *modified*, 663 F. Supp. 149 (W.D. Ark. 1985).

[97] Keough v. Tate County Bd. of Educ., 748 F.2d 1077 (5th Cir. 1984).

[98] Newsome v. Batavia Local Sch. Dist., 842 F.2d 920 (6th Cir. 1988); Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260 (5th Cir. 1985).

[99] Tasby v. Estes, 643 F.2d 1103 (5th Cir. Unit A Apr. 1981).

[100] Gonzales v. McEuen, 435 F. Supp. 460 (C.D. Cal. 1977); Alex v. Allen, 409 F. Supp. 379 (W.D. Pa. 1976).

- The right to be represented by an attorney. Once again, the courts are split.[101]
- The right to a recording or transcript of the hearing. Most courts do not recognize this right.[102]
- The right to a written statement of the reasons explaining the decision to suspend, also not required by most courts.[103]

Given the uncertainties in the law, the prudent course is to provide extensive due process in cases where long-term exclusion from school is contemplated. Schools should endeavor to fairly apply preestablished standardized disciplinary procedures to avoid the appearance of prejudice, minimize the potential for litigation, and, most important, prevent unjust punishments. This means, for example, not allowing the individual presenting the case against the student to attend the tribunal's private deliberations because this practice allows new evidence to be introduced without refutation and gives the impression that the tribunal is giving serious attention to only one side of the case. Similarly, extensive use of hearsay should be avoided for the same reason it is excluded from criminal courts: Second-hand testimony tends to be unreliable and difficult to refute. If the school's case is presented by an attorney, the student should be permitted to have one as well. In short, as a matter of sound education policy, sound administrative practice, and simple fairness, schools should endeavor to employ evenhanded disciplinary procedures designed to ascertain the truth.

5.5 THE ASSIGNMENT OF PUNISHMENT

The assignment of punishment is the last phase of student discipline, and, as a practical matter, the one that matters most. Severe punishments have the potential to adversely affect students' life prospects, whereas lenient punishments may fail to instruct students as to the severity of their infractions and leave others vulnerable to the students' continued wrongdoing. In a sense, the assignment of punishment also has the greatest potential to bring litigation of any aspect of student discipline. Students may bring lawsuits objecting to the wording of school rules, they may claim that evidence of their wrongdoing was gathered unlawfully or that due process protections were not scrupulously observed, but whatever the official cause of action, often their real complaint is that they are being punished. In recent years, lawsuits directly challenging the school's authority to impose a particular punishment in response to a particular offense or to impose a particular punishment at all have become more common. With so much at stake, morally, educationally, and legally, attention to fairness, to the needs of offending students and others in the school community, and to the legal limits on the school's authority to punish is crucial.

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[101] Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Gonzales v. McEuen, 435 F. Supp. 460 (C.D. Cal. 1977).

[102] Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984); *aff'd*, 787 F.2d 590 (6th Cir. 1988).

[103] Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984); *aff'd*, 787 F.2d 590 (6th Cir. 1986).

Federal and state constitutions and statutes as well as the common law all bear on the authority of schools to punish their students. The Fourth Amendment protection against "unreasonable . . . seizures" has been used to challenge punishments that isolate or confine a student such as placement in a so-called "time-out" room. Generally, these suits will not succeed provided the punishment is "reasonably related to [its] objectives . . . and not excessively intrusive in the light of the age and sex of the student and the nature of the infraction." Suits challenging punishments that violate this principle may be successful. In one case, a federal district court refused to dismiss a suit involving the use of a time-out room where: the room could be used at the absolute discretion of the teacher, the locking of the room violated the fire code, the use of a time-out room had not been written into this disabled student's individual educational plan, the use of the time-out room was without parental consent, and although teachers could look into the room through a peep hole, the student could not look out.[104]

After being paddled twenty times with a wooden paddle two feet in length, three to four inches wide and one-half inch thick, James Ingraham brought suit arguing that his Eighth Amendment rights to be free from cruel and unusual punishments had been violated. The Supreme Court rejected this claim in *Ingraham v. Wright*,[105] finding that the Eighth Amendment was only applicable to criminal proceedings. In any event, said the Court:

> Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education of the child; any punishment going beyond the privilege may result in both civil and criminal liability. As long as the schools are open to the public scrutiny, there is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged in this case.

The Court also concluded that the Due Process Clause did not require notice and a hearing prior to the imposition of corporal punishment.

Although the Eighth Amendment does not apply to corporal punishment in the context of public schools, the Fourteenth Amendment does. Thus, students who are physically punished by school officials may seek redress by claiming that their right to bodily integrity as protected by the Due Process Clause of the Fourteenth Amendment has been violated. This is a different sense of due process from the procedural requirements discussed earlier in the chapter. As the Fifth Circuit explained, "Corporal punishment is a deprivation of **substantive** due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[106] Whether or not school officials may be held constitutionally liable for excessive force depends, according to the Fourth

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[104] Rasmus v. State of Arizona, 939 F. Supp. 709 (D. Ariz. 1996).

[105] 430 U.S. 651 (1977).

[106] Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243 (5th Cir. 1984).

Circuit, on the severity of the injury caused by the punishment, the proportionality of the punishment to the need for it, and whether the punishment was motivated by malice or sadism and was shocking to the conscience.[107] The Third Circuit adopted this test except it does not require proof of malice or sadism.[108] When the *Ingraham* case was decided, only two states banned corporal punishment; today, at least twenty states do. Many school boards in states that permit corporal punishment have banned the practice or severely limited its use. As the above quote from *Ingraham* suggests, state laws and local policies permitting corporal punishment do not immunize educators from legal problems connected with its use. Educators who employ corporal punishment improperly or violate school board procedures may face dismissal.[109] They may also face civil or even criminal liability for excessive physical punishment resulting in harm. In deciding whether a particular instance of corporal punishment is improper, a court will consider the age and physical condition of the student; the seriousness of the misconduct; the specific details and severity of the punishment including part of the body hit, number of blows, implement and force employed, and the injury resulting; the past behavior of the student; the frame of mind of the disciplinarian including whether there was anger or malice; the availability of less severe but equally effective means of discipline; and whether the school's own regulations concerning corporal punishment were followed.[110] (See also discussion of assault and battery in sec. 12.1.) Schools using corporal punishment should, therefore, at the very least, adopt and abide by a rigid set of self-restrictions designed to ensure that punishment is neither excessive nor otherwise unlawful. One sound practice would be to require the presence of a second educator as witness whenever a student is paddled.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment have also been used to challenge school punishments other than corporal punishment. One student claimed that expulsion violated his implicit right to an education under the U.S. Constitution. A federal district court disagreed and ruled that there is no such right and, therefore, that expulsion is proper if rationally related to a legitimate governmental purpose.[111] Likewise, students arguing that exclusion from school without provision of an alternative educational program violates their state constitutional right to an education generally have not met with success. Students do have a right to a state funded education, say the courts, but the right can be forfeited by violating school rules.[112] However, the West Virginia Supreme Court upheld the constitutionality of long-term suspensions only after noting that the suspended students would still have "reasonable state-funded basic educational opportunities and services available."[113]

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[107] Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

[108] Metzger v. Osbek, 841 F.2d 518 (3d Cir. 1988).

[109] Bott v. Bd. of Educ., Deposit Cent. Sch. Dist., 360 N.E.2d 952 (N.Y. 1977).

[110] Thompson v. Iberville Parish Sch. Bd., 372 So. 2d 642 (La. Ct. App. 1979); P.B. v. Koch, 96 F.3d 1298 (9th Cir. 1996); B.L. v. Department of Health & Rehabilitative Serv., 545 So. 2d 289 (Fla. Dist. Ct. App. 1989); People v. Wehmeyer, 509 N.E.2d 605 (Ill. App. Ct. 1987); Rolando v. School Dir. of Dist. No. 125, County of LaSalle, 358 N.E.2d 945 (Ill. App. Ct. 1976); Calway v. Williamson, 36 A.2d 377 (Conn. 1944).

[111] Craig v. Selma City Sch. Bd., 801 F. Supp. 585 (S.D. Ala. 1992).

[112] Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088 (Mass. 1995); Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807 (Neb. 1997); D. B. v. Clarke County Bd. of Educ., 469 S.E.2d 438 (Ga. Ct. App. 1996).

In general, whether an excluded student must be given an alternative program is a statutory rather than a constitutional issue. Similarly, the maximum length of permissible suspension, whether permanent expulsion is allowed, and what offenses may result in suspension or expulsion are also determined by state statute.[114] For example, Kansas statutes authorize "any certified employee" to "suspend or expel" a student for violation of any rule "published" by the school or "approved" by the board, "conduct which disrupts, impedes or interferes with the . . . school," "conduct which substantially impinges upon or invades the rights of others," conduct that has resulted in a conviction for any state or federal crime, or disobeying an order of a teacher or other school authority. Although this list seems to give the school very wide discretion to exclude students, the law goes on to state that, "an expulsion may be for a term not exceeding 186 school days," so permanent exclusion is not allowed.[115]

Sometimes, statutes may require that a particular punishment be applied to a particular offense. The Gun Free Schools Act of 1994[116] requires that states receiving federal education funds (that is, all states):

> shall have in effect a State law requiring local educational agencies to expel from school for period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

The Act goes on to say that states may if they wish permit school districts to provide alternative "educational services" to excluded students. Many states have recently modified their own statutes to comply with this federal mandate.[117] Some state laws also mandate exclusion from school under other specified circumstances. In Massachusetts, for example, principals are required to suspend pupils they deem a threat to other students and staff.[118]

Two students who were disciplined by being locked for a day in a small, dirty janitor's closet without lunch or bathroom breaks successfully brought a due process case against the school.[119] Other due process cases have challenged the assignment of academic penalties such as grade reduction for nonacademic misconduct. These cases have had mixed outcomes with some upholding grade reductions for students under disciplinary suspensions[120] and others rejecting the practice.[121] Students have also challenged grade reductions and other academic penalties for nonacademic misbehavior on statutory grounds. The Supreme Court of Connecticut concluded that a school does have the authority both to reduce grades for unapproved absences and to withhold credit from a student who missed twenty-four classes.[122] Likewise, a New York court upheld a district's authority to withhold course credit from a student who missed more than ninety percent of all classes.[123] In general, grade reductions for truancy have survived both constitutional and statutory challenges.[124] However, other courts have ruled that school districts lack authority to reduce grades for classes missed for illness or while suspended from school for disciplinary reasons.[125]

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[113] Cathe v. Doddridge County Bd. of Educ., 490 S.E.2d 340 (W.Va. 1997).

[114] Spencer v. Omaha Pub. Sch. Dist., 566 N.W.2d 757 (Neb. 1997).

[115] Kan. Stat. Ann. §§ 72-8901-02.

[116] 20 U.S.C. §8921.

[117] *See, e.g.*, W. Va. Code § 18A-5-1a.

[118] Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088 (Mass. 1995).

[119] Orange v. County of Grundy, 950 F. Supp. 1365 (E.D. Tenn. 1996).

[120] New Braunfels Indep. Sch. Dist. v. Armke, 658 S.W.2d 330 (Tex. App. 1983).

[121] Smith v. School City of Hobart, 811 F. Supp. 391 (N.D. Ind. 1993); Hamer v. Board of Educ., 383 N.E.2d 231 (Ill. App. Ct. 1978); Dorsey v. Bale, 521 S.W.2d 76 (Ky. Ct. App. 1975).

Equal protection cases may be brought against schools whose disciplinary policies discriminate on the basis of race, religion, gender, or national origin, such as by punishing students of one race more severely than another for the same offense.[126] Federal statutes also prohibit racial or gender discrimination in education including the assignment of punishment (see chap. 6) and place significant limitations on the punishment of disabled students (see chap. 7). Students singled out for more severe punishment than other wrongdoers for reasons other than race, religion, gender, or national origin can also bring equal protection cases, but the school will prevail as long as it has a rational basis for the differential treatment.[127] For example, applying a more severe punishment to a ringleader or to a repeat offender will probably be upheld.[128]

A final constitutional issue of potentially great significance to students who commit criminal acts at school is the question of whether being punished in a school proceeding and later by a court of law constitutes double jeopardy. The Fifth Amendment states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." After all, students have argued, both schools and courts are agencies of the state. However, courts have rejected the argument that being punished at school precludes being punished again in court for the same offense and vice versa.[129]

Thus, students have tried to rely on a wide variety of federal constitutional principles to challenge school punishments, mostly without success. As long as punishments are reasonable in light of the student's infraction and the purpose for which they are given, as long as punishments are not so severe as to shock the conscience, and as long as punishments are not applied in a discriminatory manner, the Federal Constitution will not interfere with the judgment of educators concerning the appropriateness of punishment. At the same time, the constitutions and statutes of many states and the policies of some school boards place important limitations on the authority of school officials to assign punishment. School officials who ignore these limitations place themselves and their schools at risk of litigation and place their jobs in jeopardy.

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[122] Campbell v. Board of Educ. of New Milford, 475 A.2d 289 (Conn. 1984).

[123] Bitting v. Lee, 564 N.Y.S.2d 791 (App. Div. 1990).

[124] Raymon v. Alvord Indep. Sch. Dist., 639 F.2d 257 (5th Cir. Unit A March 1981); Knight v. Board of Educ. of Tri-Point Community Unit Sch. Dist. No. 6-J, 348 N.E.2d 299 (Ill. App. Ct. 1976); *but see*, Hamer v. Board of Educ., 383 N.E.2d 231 (Ill. App. Ct. 1978); Dorsey v. Bale, 521 S.W.2d 76 (Ky. Ct. App. 1975).

[125] Gutierrez v. School Dist. R-1, 585 P.2d 935 (Colo. Ct. App. 1978).

[126] Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974).

[127] Smith v. Severn, 129 F.3d 419 (7th Cir. 1997).

[128] *See*, Reed v. Vermilion Local Sch. Dist., 614 N.E.2d 1101 (Ohio Ct. App. 1992).

[129] Matter of C.M.J., 915 P.2d 62 (Kan. 1996).

5.6 SUMMARY

Schools are permitted by statute and common law to regulate the conduct of their students. In matters of rule making, investigation of misconduct, determination of guilt, and assignment of punishment, schools generally have broad latitude. However, both state statutes and the Constitution constrain the performance of all these functions. The overriding constraint is that a school may only limit the behavior of its students in ways that are reasonably related to the promotion of legitimate educational goals.

Schools are free to create and enforce almost any rule that meets this general constraint. However, rules with no significant educational purpose and most regulation of off-campus behavior are beyond the statutory authority of the school board. Although it is not necessary to base all disciplinary action on specific preexisting rules, courts may object on due process grounds to enforcement of standards announced only after the fact. This is particularly likely when a school seeks to punish behaviors that common sense does not indicate are impermissible. The most common constitutional objection to a school rule is that it is vague. Although school rules may be more general than criminal statutes, most courts nevertheless insist that they be specific enough to permit the average student to distinguish between allowable and prohibited conduct.

When investigating possible student misconduct, school officials may employ any surveillance technique that does not intrude on a reasonably held expectation of privacy. Most courts permit searches of a student's locker without permissions because the locker is controlled jointly by the student and school. Officials may question students without allowing them an attorney or alerting them to their privilege against self-incrimination. However, in order to search a student's pocket, purse, or other personal belongings, a school official must have reasonable grounds to believe that the search will produce evidence of a violation of a specific school rule or law. The suspicion must be directed at the specific student to be searched. Even so, the scope of the search must be reasonable considering the rule violated, the evidence sought, and the intrusiveness of the investigation. Certain random searches, such as required drug screening for athletes or metal detectors for everyone entering a school, may be permissible, especially if the purpose is to protect and educate rather than to punish.

The Due Process Clause of the Fourteenth Amendment requires that students be given an opportunity for a hearing prior to exclusion from school for disciplinary reasons. In *Goss v. Lopez*, the Supreme Court ruled that minimum due process for short-term suspensions of up to ten days consists of notification of charges and an opportunity to refute them. An informal hearing may take place right after the infraction, and punishment may then be assigned. Suspensions lasting more than ten days require more elaborate due process. The accused student must be given advance notice of the charges and time and place of the hearing. Some, but not all, jurisdictions enforce other procedural protections and rules of evidence, such as the right to counsel, to cross-examine adverse witnesses, and to exclude hearsay testimony. The overriding requirement is that the tribunal be fair and impartial with the student having adequate opportunity to present evidence and refute the opposing case. However, no hearing is required for corporal punishment or most mild classroom and school penalties.

Most constitutional challenges to schools' authority to punish their students for wrongdoing have not succeeded. However, state statutes generally set the limits of allowable punishment such as the maximum length of exclusion from school. Except where prohibited by statute or board policy, school officials may employ corporal punishment, although excessive or improper use of force or corporal punishment may lead to firing and civil or criminal penalties. School officials may also use reasonable force to keep order, to prevent harm to others or damage to property, or to defend themselves. Besides corporal punishment, the most controversial school penalty is grade reduction, but most courts have upheld academic penalties for truancy or work missed while under disciplinary suspension.

CHAPTER 6

EQUAL EDUCATIONAL OPPORTUNITY: RACE AND GENDER

This is the first of three chapters dealing with issues of equity in education. This chapter looks at legal efforts to end discrimination based on race and gender. The litigation and legislation it examines challenge a variety of discriminatory practices including forced segregation of the races, gender-based denial of educational opportunity, racial and gender discrimination in school discipline and athletics, and racial and sexual harassment. Chapter 7 examines equity issues relating to student populations with special needs: For disabled and non-English speaking pupils, equality of opportunity may require an educational program that is different and in some cases even separate from the majority of pupils. Chapter 8 considers a third set of equity issues relating to the way public education is funded.

For almost fifty years, the search for equality of opportunity has been the subject of more influential litigation than any other educational issue. Even after all this time, however, the meanings of terms like equity and equality of opportunity have not been fully clarified. Does equity mean providing the same education to everyone or does it mean providing all pupils with an education tailored to their particular characteristics and needs? Does equity require spending the same amount on each student or more on some than others or should equity be viewed in terms of outcomes? For example, should everyone be given whatever education is necessary to reach a certain level of achievement? Issues like these play a central role in the cases and principles discussed in all three chapters.

Historically, Blacks were the first group to bring serious legal challenge to the notion that states are free to provide whatever education they choose to whomever they wish. The case that dispelled this notion forever was

Brown v. Board of Education.[1] The claims of the various other groups discussed and the litigation they have brought, although different in important respects, can be viewed as descended from *Brown*.

6.1 THE EQUAL PROTECTION CLAUSE AND RACIAL DISCRIMINATION

The legal foundation of *Brown* and of the quest for equality of opportunity in education generally is the Equal Protection Clause of the Fourteenth Amendment of the Constitution, which states: ". . . [N]or shall [any State] deny to any person within its jurisdiction the equal protection of the laws."

Over the years the Supreme Court repeatedly has been called upon to define and interpret these simple-sounding words. In rough terms, to deny equal protection means to treat a person or group differently from others without sufficient reason. The Fourteenth Amendment permits classification and differential treatment of individuals by the government if there exists an adequate justification but prohibits discrimination when no satisfactory reasons exist.

Governments create distinctions among people in almost everything they do. For example, some individuals are classified as criminals and sent to jail, whereas others remain free. Some are issued driver's licenses but others are denied them. In the realm of education, some, but not all, people are compelled to attend school. Clearly people are treated differently but there may be adequate justification based on criminal behavior (incarceration), physical capacity (driver's licenses), or age (compulsory schooling). Other bases of classification such as race, religion, or gender may not be adequate to legitimate the same differential treatment. How do courts determine if the justification for a particular classification is adequate? How are equal protection cases decided?

A typical equal protection case begins with an individual or group complaining that they have been denied a benefit or suffered a burden unfairly. In most cases, the criterion used by the government to allocate or deny benefits or to impose burdens selectively is overt. This was the case in the south in the early 1950s when schools were segregated: Race was the openly used criterion for assigning students to schools.

Sometimes, however, differential treatment occurs, but the criterion of classification is not openly acknowledged. This may occur in education when, for example, a school board uses a "freedom of choice" or "open enrollment" policy as a ruse to maintain segregated schools.[2] In cases like these, the Supreme Court has placed the burden of establishing the actual basis of the differential treatment on the plaintiffs. For example, when racial discrimination is claimed but not acknowledged, plaintiffs must prove that government policies were in fact driven by considerations of race.

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[1] 347 U.S. 483 (1954).

[2] Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).

Once the criterion of classification has been established, it must next be determined whether the plaintiff or the government bears the burden of proving the adequacy of the justification for differential treatment and whether the differential treatment is in fact justified. With regard to both these issues, the Supreme Court has decided that the answers shall depend in part on the criterion of classification used. When race is the criterion, the burden of proof is on the government to provide an extremely strong justification for its law or policy. In effect, race-dependent classification is presumed unconstitutional, and unless the government can overcome the presumption by providing a truly extraordinary justification, the policy is unconstitutional.

In imposing this heavy burden of proof, courts employ a test known as **strict scrutiny**. Under this test, a law or policy is presumed unconstitutional unless the government can show that it is necessary to achieve a compelling state interest. Government actions subjected to strict scrutiny will be declared unconstitutional unless they are found essential to the attainment of a legitimate and extremely important goal.

As shown later in this chapter and in subsequent chapters, courts do not impose the ultimate burden of persuasion on the government in all equal protection cases nor do they always require such a strong justification for differential treatment. Courts do impose this heavy burden on the government in race cases because all branches and levels of government have now acknowledged that U.S. history is marked by many instances of invidious and unjustified racial discrimination. Accordingly, when a court sees a policy formulated on the basis of race, it suspects that racial discrimination may again be occurring and it wants strong and convincing assurances from the government that this is not the case. Strict scrutiny is a court's way of demanding the necessary assurances. Strict scrutiny promotes the goal of equal protection of all races by imposing a burden that the government is rarely able to meet. (Strict scrutiny is also used in cases involving fundamental rights—not normally relevant to education cases.[3])

6.2 HISTORICAL PERSPECTIVE: EQUAL PROTECTION PRIOR TO *BROWN v. BOARD OF EDUCATION*

The Fourteenth Amendment was adopted in 1868 in the aftermath of the Civil War to protect the legal and political rights of newly freed slaves. Twelve years later the Supreme Court, in *Strauder v. West Virginia*,[4] used the amendment for the first time to strike down a law barring Blacks from serving on juries. The case was easy because the law was clearly and overtly discriminatory. As the Court said, the Fourteenth Amendment protected Blacks from "legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

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[3] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[4] 100 U.S. 303 (1879).

In 1886, the Court for the first time recognized the existence of racial discrimination in the application of a facially neutral law.[5] The facts of the case were that all non-Chinese seeking waivers of a law prohibiting the operation of laundries in wooden buildings were approved, but none of the 200 Chinese applicants received waivers. The Court said this was a form of racial discrimination. A law may be fair on its face, but when administered "with an evil eye and an unequal hand" so as to make unjust discriminations between persons, it is unconstitutional. "The discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."

However, in 1896, in *Plessy v. Ferguson*,[6] the Court upheld a Louisiana statute requiring "equal but separate accommodations for the white and colored races" on trains. This decision might at first seem inconsistent with *Strauder*, but the Court saw a distinction between the two cases: The law in *Strauder* clearly gave different rights to Blacks and Whites, but the *Plessy* law treated Blacks and Whites the same. The Court rejected the claim that the Louisiana statute had a stigmatizing effect on Blacks and endorsed the legally enforced separation of the races as constitutionally permissible. The *Plessy* Court did not employ the strict scrutiny test because it had not yet been developed for use in any kind of case. Rather the Court placed the burden of proof on the plaintiff to show that the law was without adequate justification. Ultimately, however, the Court found many social justifications for the law and rejected the plaintiff's claim of its harmful effects.

In 1938, in a nonrace case, the Court took its first step toward adopting the strict scrutiny test. In *United States v. Carolene Products Co.*,[7] the Court said that the usual presumption that laws and policies are constitutional may be weakened in cases where: (a) the legislation concerns matters specifically prohibited by the first ten amendments, (b) the legislation affects the right to vote or to disseminate information or interferes with political organizations, or (c) the legislation is directed toward religious or racial minorities. Regarding the last point, the Court specifically suggested that there would be a need for more "searching judicial inquiry" when "prejudice against discrete and insular minorities curtails the normal political processes ordinarily to be relied upon to protect" them. With these dicta, the Court signaled that it would use something like strict scrutiny to deal with legislation designed to disadvantage a particular race.

Another 1938 case, *Missouri ex rel. Gaines v. Canada*,[8] involved racial discrimination in education directly. The plaintiff challenged a policy of the University of Missouri law school denying admission to Blacks. Missouri had no separate law school for Blacks, but the state offered to pay the plaintiff's tuition at an out-of-state school. The Court declared that Missouri's policy of providing a law school for Whites but none for Blacks violated the Equal Protection Clause even under the separate but equal doctrine.

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[5] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[6] 163 U.S. 537 (1896).

[7] 304 U.S. 144 (1938).

[8] 305 U.S. 337 (1938).

Gaines provided the basis for a sustained assault, led by the National Association for the Advancement of Colored People (NAACP), on the segregated higher education systems of several states. In *Sweatt v. Painter*,[9] the plaintiff claimed that Texas's separate Black law school was unequal both in tangible and intangible ways. The Court agreed that the White and Black law schools were unequal in such intangibles as reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions, and prestige. Thus, Texas had not met the full requirements of separate but equal, and the Court ordered the admission of the Black plaintiff to the White law school.

In *McLaurin v. Oklahoma State Regents*,[10] decided the same year as *Sweatt*, the Black plaintiff had been allowed to attend the University of Oklahoma but was segregated from the White students. He was assigned to a desk in an anteroom of the classroom, confined to the mezzanine of the library, and required to eat at a separate table in the cafeteria. The Court rejected this arrangement saying that McLaurin was "handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussion and exchange views with other students, and, in general, to learn his profession. . . . The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."

None of the cases directly overturned the doctrine of separate but equal but they were steps toward its elimination. Neither did these cases embrace the use of the strict scrutiny test in race cases. Yet, the Court in fact had used that test in 1944 in a noneducation case, *Korematsu v. United States*.[11] The case challenged a military order excluding all persons of Japanese ancestry from significant areas of the West Coast following the attack on Pearl Harbor. The Court wrote, ". . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." However, in applying the strict scrutiny standard, the Court concluded that the military order was justified by concerns of national security. This is one of the few race cases employing the strict scrutiny test that the government has won.

During this same period no such evolution was occurring in the Court's application of the Equal Protection Clause to cases not involving race. In *Goesaert v. Cleary*,[12] the plaintiff challenged a Michigan law denying bartender's licenses to women except wives or daughters of bar owners. The Court began by stating that historical tradition justified regulating the work of women in bars: "The Fourteenth Amendment did not tear history up by the roots . . . the vast changes in the social and legal position of women . . . (do) not preclude the states from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic."

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[9] 339 U.S. 629 (1950).
[10] 339 U.S. 637 (1950).
[11] 323 U.S. 214 (1944).
[12] 335 U.S. 464 (1948).

Regarding the exception for relatives of bar owners, the Court wrote, "While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason." However, the Court was satisfied that Michigan had a sufficient reason: It wished to protect women whose husbands or fathers were not present in the bar. This justification was accepted even though women were permitted to work as waitresses in bars, just not bartenders. Said the Court: "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce."

In contrast to strict scrutiny, the test used in *Goesaert* is known as **rational basis**. This test places the burden of proof on the plaintiff to show that the government's policy does not serve a legitimate purpose or that the classification is not connected in any reasonable way to a legitimate goal. Thus, in most nonrace equal protection cases, the plaintiff carries the burden of overcoming the presumption that the law is constitutional. The presumption can be overcome only by showing that the legislature was pursuing illegitimate purposes in creating the law or that its method of achieving a legitimate purpose was irrational or unreasonable. This can rarely be accomplished.

In sum, when *Brown v. Board of Education* reached the Supreme Court in 1954, the equal protection doctrine had three dimensions: (a) in racial segregation in higher education cases, separate but equal was being enforced in a way that was forcing some institutions to integrate; (b) in other race cases, the Court was moving toward the use of the strict scrutiny test; and (c) in nonrace cases, the Court was bending over backward to avoid rejecting any law by using the rational basis test.

6.3 RACIAL SEGREGATION

Encouraged by the success of its challenges to government-enforced segregation in public higher education, the NAACP turned its attention to the lower schools. The original plan was to pursue the same strategy as in the graduate and law school cases. Suits would be brought in various parts of the country designed to demonstrate that separate public schools were in fact unequal. The plan was not to attack directly the separate-but-equal doctrine itself but to use the doctrine to force upgrading of woefully underfinanced segregated Black schools. Then, in midstream, the NAACP changed its strategy to one of attacking the separate but equal doctrine directly. Thus the argument made to the Supreme Court in *Brown v. Board of Education* and its companion case, *Bolling v. Sharpe*,[13] was that *Plessy* should be overruled and the separate but equal doctrine rejected.

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[13] 347 U.S. 497 (1954).

BROWN v. BOARD OF EDUCATION (Brown I)

Supreme Court of the United States, 1954
347 U.S. 483

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, involving not education but transportation.* American courts have since la-

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*The doctrine apparently originated in *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state conbored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. County Board of Education*, 175 U.S. 528, and *Gong Lum v. Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Sipuel v. Oklahoma*, 332 U.S. 631; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this

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stitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

finding is amply supported by modern authority.** Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.*** The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae. . . .

**K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

***"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

* * *

De jure segregation is the separation of the races that occurs by law. By contrast, **de facto** segregation occurs for other reasons, primarily as a result of segregated living patterns. *Brown I* (so called because it was the first in a series of *Brown* cases) rejected only de jure segregation of schools. Although the decision did not refer explicitly to the strict scrutiny test, the *Bolling* decision issued at the same time did: "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* indicates that de jure segregation would be unconstitutional even if the Equal Protection Clause did not exist. "Segregation in public education," wrote the Court, "constitutes an arbitrary deprivation of . . . liberty in violation of the Due Process Clause."

The Supreme Court in *Brown I* and *Bolling* reasoned that given the social and political conditions of the United States, de jure segregated schools were inherently unequal. The Court found that schools segregated by law could not be equal because even if the physical facilities and other resources were similar, segregation in and of itself had deeply harmful effects on Black students. It wasn't long before the same reasoning was employed to bar de jure segregation in public places of all kinds.[14]

Though it was clear following *Brown I*, *Bolling*, and related cases that mandated segregation by law was unconstitutional, questions concerning the scope of the ruling remained unsettled: Did *Brown I* and *Bolling* prohibit only segregation brought about by statute, or is segregation accomplished covertly by government policy also unconstitutional? Would the Court reject only de jure discrimination or would it also strike down statutes and policies that had as an unintended by-product a discriminatory impact on racial minorities?

It took a long time, many cases, and much confusion for answers to these questions to emerge. To make a long and complex story brief, today the Equal Protection Clause prohibits both overt and covert forms of discrimination. Intentional discrimination is unconstitutional whether enacted in a statute or accomplished through administrative policies. The Equal Protection Clause does not prohibit policies that have a discriminatory or segregative impact purely as an unintended by-product. All intentional government discrimination, whether or not overtly incorporated into law, is de jure and therefore unconstitutional, but unintended discrimination is de facto and de facto discrimination is not unconstitutional.[15]

Segregation that arises entirely as a result of private, nongovernment decisions or as a result of social conditions outside the government's control is not unconstitutional. This explains why so many schools remain racially segregated more than four decades after *Brown* outlawed de jure segregation: Most students are assigned to schools in their neighborhood, and many neighborhoods are racially segregated by factors other than intentional government action.

INTENT TO DISCRIMINATE

Proving intent to discriminate is the key to many racial discrimination cases. Legislative or administrative awareness of the discriminatory consequences of a policy by itself is not enough to prove intent to discriminate. A policy will not be found intentionally discriminatory if adopted in spite of a discriminatory impact, but a policy will be found intentionally discriminatory if adopted because of a discriminatory impact.[16]

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[14] Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

[15] Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973); Washington v. Davis, 426 U.S. 229 (1976).

[16] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

However, to be successful, plaintiffs are not required to prove directly that the government tried to subject them to inferior treatment. If overt intentions cannot be established, an intent to discriminate may be inferred from a pattern of actions whose only foreseeable consequences were segregative or otherwise discriminatory. The adoption of a law or policy that a rational decision maker should have known would have a discriminatory effect is evidence of intent to discriminate. When foreseeability is combined with other corroborating evidence, intent to discriminate may be inferred.

Among the kinds of evidence that may assist in a showing of intent to discriminate are the historical background and specific series of events leading to a policy decision, departures from normal policy-making procedures, contemporaneous statements by policy makers, minutes of meetings and reports, and statements of officials at trial.[17] Plaintiffs are also assisted in their effort to prove that a school board engaged in intentional segregation system wide by two presumptions: (a) where it has been shown that a district engaged in intentional segregation affecting a substantial portion of its schools, a finding that the entire district is intentionally discriminatory is warranted absent a showing that the district is divided into clearly unrelated units; and (b) even if the district is subdivided into unrelated units, proof of intentional discrimination in one unit is evidence of an intent to discriminate in others.[18] A persistent pattern of activity with a segregative impact by a school board may also lead to a finding of intent to discriminate.

The plaintiff need not prove that the intent to discriminate was accompanied by a desire to harm. People may take discriminatory actions out of benevolent or paternalistic motives. For example, some people believed that slavery was in the best interest of those enslaved. Rather, all that needs to be established is that "but for" the consideration of race, the decision would have been different.[19] The question has been formulated this way: "[S]uppose the adverse effects of the challenged governmental decision fell on whites instead of blacks. . . . Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent." This has been called the "reversing of groups test": Would government have made the same decision if the races of those affected had been reversed?[20] If not, the court will find the policy unconstitutional unless it can survive strict scrutiny.

Diaz v. San Jose Unified School District[21] is a case where the outcome depended on whether the school board had intended to create and maintain a segregated system of education. The alleged criterion of segregation was ethnicity. Courts view segregation by ethnicity the same way as segregation by race.

The school board in *Diaz* admitted that it had "maintained ethnically imbalanced schools" and even that it had "omitted courses of action that would have reduced the imbalance," but it claimed that the segregation resulted from adherence to a "neighborhood school" policy and thus was de facto. In finding that the board had intentionally segregated the district, the court noted that over a period of years, the board had been faced with many decisions that would affect the level of segregation in the district. These decisions concerned such matters as the creation and modification of attendance areas, the building of new schools, faculty assignments, and the provision of transportation. In virtually every instance, the board chose the "more segregative alternative," even when the other alternative would have been cheaper or more efficient. Furthermore, segregative decisions continued to be made after the board had been ordered by the state to reduce the level of segregation of its schools and despite the board's full knowledge that its policies were having exactly the opposite effect.

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[17] Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[18] Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973).

[19] Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[20] David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935, 957 (1989).

[21] 733 F.2d 660 (9th Cir. 1984).

Even with all this evidence, no single action of the board was enough to support the conclusion that the board intended to foster segregation within its schools. Rather, as the court explained,

> An inescapable conclusion that the Board intended segregation emerges from a view of the evidence as a whole. The pattern of Board choices that consistently maintained or intensified segregation is apparent. Although many of the available alternatives would have presented an incomplete solution, each could have contributed incrementally toward reducing ethnic imbalance. In almost every instance, the Board chose to "turn toward segregation" rather than away from it. We are left with the firm conviction that the Board did . . . act with segregative intent. . . .

Thus, the segregation was found to be de jure and therefore unconstitutional even though neither the school board nor any other government authority had an explicit policy of maintaining segregated schools.

In cases like *Diaz*, the strict scrutiny test is often employed implicitly without being discussed. Proof of intent to discriminate also establishes that the government has no adequate justification for its actions. The government cannot meet its burden of proof under strict scrutiny because the reason for its policy was to separate or distinguish between the races. If it had a compelling reason for its policies, the government would have articulated it in the first place, rather than deny that its intention was to segregate.

School districts with no history of de jure segregation need not take affirmative steps to change policies that create de facto segregation. But school districts that have been found to be de jure segregated do have an affirmative obligation to disestablish their dual systems, undo the effects of segregation, and prevent an increase in segregation.[22] Failure to take these positive steps is itself proof of an intent to discriminate.

Although only de jure segregation violates the U.S. Constitution, some state constitutions may prohibit even de facto segregation. In *Sheff v. O'Neill*,[23] the highest court of Connecticut was presented with a pattern of racial imbalance in the state's schools that was typical of many urban areas throughout the U.S. Although statewide the school population was 25.7%

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[22] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[23] 678 A.2d 1267 (Conn. 1996).

minority, the schools of Hartford were 92.4% minority. In the suburbs surrounding Hartford, only seven of twenty-one districts had minority school populations greater than ten percent. In deciding whether this situation violated the Connecticut Constitution, the court noted that the state has an "affirmative constitutional obligation to provide all public school children with substantially equal educational opportunity." However, concluded the court, "[e]xtreme racial and ethnic isolation . . . deprives schoolchildren of a substantially equal educational opportunity. . . . Racial and ethnic segregation has a pervasive and invidious impact on schools, whether the segregation results from intentional conduct or from unorchestrated demographic factors." Thus the court declared that the school districting system in the state was unconstitutional and ordered the trial court to develop an "appropriate remedy." This conclusion seems consistent with the psychological evidence discussed in the original *Brown* decision. Why should the effects of segregation on minority students be any less damaging if the segregation results from state school districting practices, district pupil assignment policies, and White flight than if it results directly from state law? Why would de facto separate but equal be any more possible than de jure separate but equal? Nevertheless, because other state constitutions do not contain provisions like the one on which the *Sheff* decision is based, it is unlikely that other states would draw similar conclusions.

6.4 REMEDYING DE JURE SEGREGATION

After its declaration in *Brown I* that de jure segregation in education violated the Constitution, the Supreme Court had to face the practical question of what remedy to order. Clearly it was too much to expect that states with dual education systems and long histories of social separation of the races would simply create an integrated school system because of a constitutional interpretation by the Supreme Court. A year after *Brown I*, the Court issued the following opinion.

BROWN v. BOARD OF EDUCATION (Brown II)

Supreme Court of the United States, 1955
349 U.S. 294

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. . . .

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954 decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed. . . .

* * *

In hindsight, the vague, open-ended remedy announced in *Brown II* seems overly timid, especially when compared to the broad philosophical vision of *Brown I*. Essentially *Brown II* reasserts the ruling that de jure segregation is illegal and orders local authorities to make a "good faith" effort to "carry out the ruling" at the "earliest practicable date." Lower federal courts are charged with supervising the desegregation effort, but warned that in doing so they must pay attention to "varied local school problems" and the importance of "reconciling public and private needs." Perhaps the Court believed that the lower federal courts could formulate specific remedies that would take into account both constitutional requirements and local social conditions. Perhaps it was further hoped that acknowledging the need for a transition period would eventually foster peaceful compliance with the Constitution. However, regardless of the Court's intention, the next years brought very little movement toward desegregation and little further involvement by the Court itself. In the decade following *Brown*, the Supreme Court issued only three additional opinions dealing with the most blatant cases.[24]

Although it accomplished little desegregation at first, *Brown* and the resistance it engendered did much to galvanize an active and vocal civil rights movement. In turn, the work of this movement led to the adoption of the most sweeping civil rights legislation since Reconstruction, the Civil Rights Act of 1964.[25] This law, among other things, prohibited racial discrimination in programs receiving federal financial assistance and barred discrimination in employment on the basis of race, gender, and religion. Based on this law, a vigorous federal effort began to dismantle segregated school systems. For the first time, opponents of de jure segregation had a potent practical weapon: States refusing to desegregate faced a total cutoff of federal education funds.

Following the passage of this new Civil Rights Act, the Supreme Court, perhaps because it finally had vigorous allies in Congress and the executive branch of government, decided that it had waited long enough for the states to comply with *Brown*. In *Green v. County School Board of New Kent County*,[26] the Court invalidated a "freedom of choice" attendance plan allowing each pupil the choice of attending either a formerly Black or a formerly White school within the district. In practice, virtually all the district's pupils were attending the same school as before the plan was adopted. Although neutral on its face, the plan was unacceptable because it served to perpetuate the segregated school system. What the Court now wanted from these dual school systems was a pupil attendance plan that would integrate the schools, a plan that would eliminate Black schools and White schools and create "just schools." "The burden on the school board today," wrote Justice Brennan, "is to come forward with a plan that promises realistically to work now."

The Court underscored its more aggressive stance a year later in a per curiam opinion in which it said that the *Brown II* era "of all deliberate speed" was over.[27] All schools that had ever been segregated by law were now on notice that only desegregation plans that worked well and fast would be acceptable.

These decisions, however forceful, still left lower federal courts, state legislatures, and school boards with important unanswered questions: Exactly what kind of desegregation plans should and could be ordered by the lower courts? What must be done, what can be done, and what cannot be done to accomplish the mandate of *Brown*? The answers to these questions have been provided in a series of Supreme Court opinions during the past three decades.

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[24] Cooper v. Aaron, 358 U.S. 1 (1958); Goss v. Board of Educ. of Knoxville, 373 U.S. 683 (1963); Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964).

[25] 42 U.S.C. § 2000(d) et seq.

[26] 391 U.S. 430 (1968).

[27] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

Swann v. Charlotte-Mecklenburg Board of Education[28] was a 1971 case involving a large southern school district formerly segregated by law. In 1969, after several years of operating under a district court-approved desegregation plan, the school district still had more than fifty percent of its Black pupils attending schools that were more than ninety-nine percent Black. Responding to the mandate of the *Green* case, the district court imposed a new and more aggressive program of desegregation. The plan involved the grouping of inner-city mostly Black schools with outlying White schools within the district into common attendance zones with some busing of pupils in both directions. The school district challenged the district court's power to impose such a plan.

In ruling against the school district and upholding the plan, the Court declared: (a) that it was permissible for the district court to adopt as a target for individual schools a racial balance similar to the district as a whole as long as the target did not function as a rigid quota; (b) that it is possible as a result of segregated living patterns for a school district under a desegregation order to maintain some one race schools, but the school district bears the "burden of showing that such school assignments are genuinely non-discriminatory"; (c) that court-ordered grouping of schools and gerrymandering of school attendance zones is permissible as a remedy for intentional segregation; (d) that mandatory within-district busing of pupils is also a permissible remedy as long as the time or distance of travel is not "so great as to either risk the health of the children or significantly impinge on the educational process"; and (e) that once the district had achieved full compliance with a desegregation order, it would be declared "unitary" at which point no further remedies would be authorized. Even if a formerly de jure segregated school district becomes de facto segregated, "[n]either school authorities nor district courts, are constitutionally required to make year-by-year adjustment to the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."

In several cases following *Swann*, the Supreme Court developed doctrines that made it easier for plaintiffs to prove both that school authorities had engaged in de jure segregation and that their wrongful policies extended throughout the school district not just a portion of it. A practical consequence of these doctrines was to make it easier for the courts to order district-wide busing.[29]

The remedies approved in *Swann* were potentially effective methods of desegregation in school districts with racially mixed student populations (overall, Charlotte-Mecklenburg's students were about seventy percent White and thirty percent Black). However, no amount of redrawing of school attendance areas and busing of students could result in racially mixed student populations in predominantly Black school districts. Unless, of course, predominantly White school districts were combined with predominantly Black districts for purposes of implementing a *Swann*-like plan.

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[28] 402 U.S. 1 (1971).

[29] Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972).

In *Milliken v. Bradley* (*Milliken I*),[30] the district court attempted to impose just such an interdistrict remedy. The case involved the public schools of the Detroit metropolitan area. Like many large urban areas, Detroit had a mostly Black city school district surrounded by a number of mostly White suburban districts. The city school district had been found to be de jure segregated but the surrounding districts had not. Nevertheless, the district court reasoned that a desegregation plan involving only the city district could not succeed because only about one third of the city pupils were White and because any plan that aggressively distributed the White pupils throughout the district would result in significant "White flight" to the suburbs. Therefore, the district court sought to include the suburban districts in the desegregation plan. The district court reasoned that because school district boundaries are "no more than arbitrary lines on a map 'drawn for political convenience,' " there was no reason that they could not be redrawn to achieve the constitutional mandate of desegregation.

In rejecting the district court's plan, however, the Supreme Court declared that before a district court may impose

> a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the inter-district segregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy.

Because there had been no such showing in Detroit, the district court could not impose the cross-district plan. The goal of desegregation would be to create racial balance in individual schools similar to the racial make-up of the district as a whole.

If interdistrict remedies are not permitted, what, besides creating a more even distribution of the races, may district courts do to remedy de jure segregation in school districts like Detroit? In its next consideration of *Milliken v. Bradley* (*Milliken II*),[31] the district court fashioned a series of remedies designed to assure that the Black students of Detroit would not suffer educationally from the vestiges of de jure segregation. The major components of the plan were a "remedial reading and communications skills program," "an in-service training program for teachers and administrators to train [them] to cope with the desegregation process" and to ensure future equitable treatment of all pupils, a nonbiased testing program, and a "counseling and career guidance" program. This time, the Supreme Court approved the district court's plan reasoning that in creating a desegregation plan, it is "essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation." Even though the original constitutional violation consisted of assigning students to schools based on race, the remedy need not be limited to nondiscriminatory reassignment.

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[30] 418 U.S. 717 (1974).

[31] 433 U.S. 267 (1977).

> [D]iscriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system. . . .
>
> Children who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream.

Missouri v. Jenkins[32] further clarified the limits of a district court's power to include "educational components" in a desegregation remedy. In *Jenkins*, the district court ordered a costly plan that included upgrading and modifying substandard facilities to create a system of magnet schools. In order to make it possible for the school district to pay for the plan, the court mandated a property tax increase to a higher level than state law allowed. The Supreme Court found that the lower court had overstepped its authority in directly raising taxes; however, the district court was allowed to achieve the same result by ordering the local government to raise taxes beyond the state statutory limit. The Supreme Court said that this approach better served to protect the integrity of local institutions and placed the responsibility for the remedy on those who created the problem.

A magnet school-based desegregation plan was approved in *Jenkins*, as in several previous cases, even though racial quotas were employed in admitting students to schools.[33] However, in its last consideration of *Jenkins*,[34] the Supreme Court held that the district court could not continue to order salary increases for instructional personnel and extensive remedial education programs simply because "student achievement levels were still at or below the national norms at many grade levels." The ordered salary increase was simply "too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation." Also, improvement in test scores was "not necessarily required for the State to achieve partial unitary status as to the quality of education programs." Many factors other than de jure segregation affect student test scores. "So long as the [other] factors are not the result of segregation, they do not figure in the remedial calculus. . . . Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [district] will be able to operate on its own."

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[32] 495 U.S. 33 (1990); 515 U.S. 70 (1995).

[33] Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1425 (5th Cir. 1983); Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976).

[34] 515 U.S. 70 (1995).

Based on the Supreme Court's pronouncements in these and related cases,[35] the lower federal courts now mandate and authorize a variety of techniques for ending racial segregation. These techniques include but are not limited to mandatory busing, redrawing attendance zones, integration of faculties, magnet schools, magnet programs within schools, majority-to-minority pupil transfer programs, urban-suburban voluntary transfer programs (when no interdistrict violation has been proved), and, when interdistrict violations have occurred, school district consolidations and metropolitan busing plans.

Desegregation is an illusive goal in many large metropolitan areas where, after decades of "White flight," a large majority of Black children continue to attend racially identifiable schools. Given pervasive de facto segregation, continuing resistance to desegregation in some places, and constantly changing demographics and living patterns, the question arises of when has a school district succeeded in complying with a desegregation order. When, if ever, should the courts declare a case at an end and permit the school district to design its own pupil assignment plans without judicial supervision? The Supreme Court first addressed these issues in *Pasadena City Board of Education v. Spangler*.[36] The Court noted that Pasadena had implemented a court-approved plan to achieve racial neutrality in student attendance. That being the case, the district court could not require the district to

> rearrange attendance zones each year so as to ensure that the racial mix was maintained in perpetuity. . . . For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations . . . the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory patterns.

The *Pasadena* decision did not fully define the scope of the district courts' authority to order the continuation of desegregation plans. Despite *Pasadena*, it was unclear when a school district could be declared a unitary district in which all the effects of the former dual system had been eliminated. The Supreme Court addressed this question in *Board of Education of Oklahoma City Schools v. Dowell*.[37] The Court noted that judicial supervision of a local school district was intended only as a temporary measure designed to eliminate racial discrimination and assure compliance with a court desegregation order. It ruled that a formerly segregated school district should be considered unitary if "the board had complied in good faith with a desegregation decree" for a significant period of time and if "the vestiges of past discrimination had been eliminated to the extent practicable." In making the latter determination, a court should look "not only at student assignments, but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." In other words, once the effects of de jure segregation have been eliminated, a district must be considered unitary even in the face of persisting de facto segregation. The district courts may not require school districts to rearrange attendance zones and bus students in perpetuity to ensure that the integration desired by the court is maintained in the face of demographic changes.

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[35] *See*, Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189 (1973); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972).

[36] 427 U.S. 424 (1976).

[37] 498 U.S. 237 (1991).

In its most recent consideration of the issue of when a school district should be declared unitary, *Freeman v. Pitts*,[38] the Supreme Court authorized district courts to partially withdraw from control of a school district when a particular aspect of a desegregation order has been met. If, for example, all traces of segregation have been eliminated from a school district's pupil assignment procedures, the court may cease its oversight of that aspect of the district's operations while continuing to monitor other aspects of a mandated desegregation plan. The school district would, in effect, be declared unitary a piece at a time.

Despite *Freeman*, *Pasadena*, and *Dowell*, judicial supervision of school districts can continue for decades. For example, it was more than forty years after the original *Brown* decision when the courts stopped supervising pupil assignment plans in Topeka, Kansas.[39] Many other formerly dual systems have also been declared unitary including Delaware, Boston, Atlanta and Houston.[40]

6.5 OTHER FORMS OF RACIAL DISCRIMINATION

De jure segregation is not the only form of racial discrimination prohibited by the Equal Protection Clause. Students may claim racial discrimination in standardized testing, tracking and ability grouping, disciplinary policies, or other areas of school policy and practice. Regardless of the context or form of the alleged racial discrimination, to prove a violation of the Equal Protection Clause, plaintiffs must prove that school officials acted with an intent to discriminate. It is not enough that a school policy or practice happens to have a disproportionate effect on a particular race or ethnic group. For example, using an IQ test to assign pupils to ability groups may have the effect of disproportionately assigning one race to the lowest track. Or a school basketball team's try-out procedures may have the effect of excluding all members of one race from the team. Use of the IQ test or try-out procedure is unconstitutional only if done because of, rather than in spite of, its disproportionate effect.[41] Thus, a federal court refused to block the use of a nonculturally-biased minimum competency exam even though a higher percentage of Blacks than Whites failed the test. The exam's purpose was to ensure that all students reach a certain level of knowledge and skill before receiving a diploma.[42]

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[38] 503 U.S. 467 (1992).

[39] Brown v. Unified Sch. Dist. No. 501, 56 F. Supp. 2d 1212 (D. Kan. 1999).

[40] Coalition to Save Our Children v. Board of Educ., 90 F.3d 752 (3d Cir. 1996); Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987); Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975); Ross v. Houston Indep. Sch. Dist., 699 F.2d 218 (5th Cir. 1983).

[41] Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984).

Statistics showing that the burden of a particular policy or practice falls disproportionately on one race may be part of a showing of unconstitutional discrimination but by themselves they can never be sufficient. In the following case, the court relied on expert testimony as well as the admissions of school officials themselves to conclude that a school's disciplinary policy impermissibly discriminated against Black students.[43]

HAWKINS v. COLEMAN

United States District Court, Northern District of Texas, 1974
376 F. Supp. 1330

Hughes, District Judge.

The [Dallas Independent School District] DISD is the principal school district in Dallas County, Texas. . . .

Until the summer of 1971, the DISD continued to operate a dual school system. . . .

As a result of the Tasby decision, the DISD entered into a program of student re-assignment designed to bring about an integrated school system. This program of student re-assignment resulted in a substantial number of black students being transferred from schools in which black students were in the majority to schools in which black students were in the minority.

The issues on this hearing . . . focus upon the student suspension procedures per se or upon the application of those procedures. . . .

It is plaintiffs' contention that the procedures are enforced in a racially discriminatory manner. . . .

The greater part of plaintiffs' evidence dealt with the application and enforcement of the discipline procedures. This testimony consisted of (1) DISD student suspension data (2) analysis of that data by an expert witness and (3) evaluation of the meaning of the analysis. . . .

[U]nrebutted statistics establish that there exists within the DISD a disproportionate suspension ratio between black students and white students.

With respect to corporal punishment, the DISD for the school year 1972–1973 for the first time maintained statistics on the basis of race. . . .

While the statistics for corporal punishment are not as disproportionate for blacks and whites as the suspension statistics, they reveal a similar disparity. . . .

[D]ata relating to the schools in which white students outnumber black students reveals there is an even greater general disproportion as to the frequency of suspensions and the incidents of corporal punishment among blacks than whites than exists in all the schools.

While the statistical data alone reveals there is a significant disparity in suspension and corporal punishment statistics as applied to black and white students, an expert on statistical analysis, Dr. Scott Kestler, conducted an extensive analysis by using a method termed the Chi Square formula to determine whether the frequency of suspension of black students over white students is significantly different from their racial composition. . . .

His calculations resulted in the following conclusions:

(1) Black students are being suspended from school significantly more frequently than are White students.

(2) Black students are being suspended from elementary schools significantly more frequently than are White students.

(3) Black students are being suspended from junior high schools significantly more frequently than are White students.

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[42] Debra P. v. Turlington, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

[43] *See also*, Lora v. Board of Educ. of N.Y., 456 F. Supp. 1211 (E.D.N.Y. 1978), 623 *vacated*, F.2d 248 (2d Cir. 1980); Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973), *aff'd*, 507 F.2d 675 (5th Cir. 1975).

(4) Black students are being suspended from senior high schools significantly more frequently than are White students.

(5) Black students receive "more-than-3-day" suspensions significantly more frequently than do White students.

Dr. Kestler's . . . conclusions confirm the statistical data furnished by DISD.

Having determined there is a significant disparity between the blacks and whites disciplined, it now becomes necessary to determine the reasons for this disproportion. An examination of suspension and corporal punishment data for the years 1972–73 and the first half of 1973–74 shows that 60% were for such offenses as truancy, class cutting, talking back to the teacher, or other non-violent conduct.

As a part of his investigation Dr. Kestler visited six schools where white students outnumber black students. It was his conclusion from his visits and his calculations that the DISD applied discipline in a racially biased manner. Dr. Kestler noted there was a substantial reliance upon non-violent "offenses" as a justification for suspension when, in fact, such conduct may be a pivotal ethnic characteristic. The primary reasons, he said, for student suspension are ones that are highly susceptible of selective perception and selective prosecution.

Dr. Kestler additionally concluded there were two possible reasons for the disproportionate student suspension and corporal punishment statistics. One reason was racial bias in the administration of the student discipline procedures and policies, a factor that Dr. Kestler said definitely existed within the DISD. The second reason was increased "suspendable conduct" on the part of black students.

Dr. Reuben McDaniel, an expert on institutional racism, concluded from his examination of Dr. Kestler's data that the DISD fit into an existing national pattern of race discrimination in that the DISD is a "white controlled institution" with "institutional racism" existing in the operation of its discipline procedures. A "white controlled institution" occurs, testified Dr. McDaniel, when a large majority of the decisions about resource distribution is made by white administrators. "Institutional racism" exists, according to Dr. McDaniel, when the standard operating procedures of an institution are prejudiced against, derogatory to, or unresponsive to the needs of a particular racial group. This is distinguished from "personal racism" which exists within a given individual and do[es] not become involved in the administration of an institution's normal operations.

Because of the existence of racism, Dr. McDaniel concluded black students will become more frustrated as the institution continues to refuse to respond to their needs and ambitions. This frustration will be reflected either in increased passivity or increased hostility. Such hostilities will result in increased "suspendable behavior," a term used by Dr. Kestler as one of the causes for the disproportionate suspension ratios. Moreover, Dr. McDaniel concludes, in a school district in which there is institutional racism toward the Blacks' conduct by black students that would not be "unusual" or "offensive" in a black environment becomes to many teachers "disruptive" or "suspendable conduct." To teachers unfamiliar with Blacks, this conduct, that is nonviolent and characteristic of the black race, stands out and becomes thereby subject to selective prosecution. For example, Dr. McDaniel, himself a Black, testified that among Blacks there is substantial physical contact. To a teacher unfamiliar with the subtle nuances of this type of conduct, a touch or slap by one black student on another black student may be interpreted as a hostile act when in fact it was a friendly act. Therefore, this teacher may recommend disciplinary action when it is unjustified.

In conclusion, Dr. McDaniel testified that to parents and students within the DISD based on Dr. Kestler's statistical analysis the DISD would be perceived as a racial institution. . . .

One of the most damaging witnesses to the defendant was Dr. Nolan Estes, superintendent of the DISD, called by the plaintiffs. Asked if he was aware of anything to which he could "attribute the high number of suspensions of Blacks' over Whites," he replied, "Well, we are a White controlled institution, institutional racism, racism among individuals." Later on in his testimony he admitted again that white institutional racism existed in the Dallas Schools. In response to questioning about whether he had ever before stated this he replied that he had "before our principals' group," which was not an open public meeting.

The defendants presented no evidence to rebut the testimony . . . that racism exists within the DISD and contributes to the suspension of black students.

In order to overcome the problem of racism Dr. McDaniel testified that there was a need for the school district to be responsive to the needs of black students. Such institutions, he said, had done things on four essential levels. "First, they had acted in terms of institutional and structural changes. Secondly, they had reacted in terms of training of teachers and counselors. Thirdly, they reacted in terms of the training of students to deal with institutionalized racism. Fourth, they had been active in terms of their community or their environment in attempting to push programs of affirmative action." . . .

> He pointed out that institutions must hold personnel accountable for decreasing racism and the ability of teachers to deal with the situation should be a criterion for promotion and pay raises. . . . He emphasized the necessity of training in human relations must include information which makes administrators and teachers understand their own feelings and reactions toward minority students. Also teachers should have a cultural awareness of Black people which is frequently not appreciated by Whites. . . .
>
> At the same time that teachers are being trained in ways to decrease racism, students, he said, need to learn "to manage their way through the racist institution." Racism will not be overcome quickly and in the meantime Blacks must be taught to live in a white dominated society.
>
> With regard to a community program, he urged that the schools be active, working with groups to develop a better understanding of community problems. The institution should not simply "mirror the community."
>
> These programs Dr. McDaniel maintained would resolve conflict and ease tensions within the school system." . . .
>
> Defendants offered no evidence to establish that any administrator is currently assigned the responsibility of implementing a remedy that will eliminate the current racial application of the suspension policies. Although Dr. Estes and other DISD administrators and officials have been aware of the problem since the compilation of the 1971–72 school year suspension statistics, no affirmative countervailing action has been taken. All of the DISD programs are "long term" permitting the continued discrimination to exist for an indefinite period.
>
> It is apparent that the program thus far in effect in the DISD has not worked to materially change the existing racism which, in the opinion of this Court, is the chief cause of the disproportionate number of Blacks being suspended and given corporal punishment. An improvement in the situation demands an affirmative program. Such a program should include the four levels outlined by Dr. McDaniel, as heretofore discussed.
>
> This Court will not detail such a program as the Court has no intention of taking from the School Board or the Superintendent and other officials the running of the schools. . . .
>
> While not attempting to dictate the details of an affirmative program this Court does direct the DISD to review its present program and to put into effect an affirmative program aimed at materially lessening "white institutional racism" in the DISD.

* * *

The *Hawkins* court was convinced that much of the disproportionate suspensions and corporal punishment given to Black students were the result of the cultural insensitivity and bias of the Dallas schools and their employees. Therefore, the discrimination was ruled intentional even though there was no evidence that school officials had set out to punish Black students more frequently than Whites.

Another disproportionate impact case arose in connection with a school district's attempt to desegregate. The district adopted a "majority to minority" transfer program allowing students to transfer out of their regular attendance area provided the transfer would move the racial balance of the student's new school closer to that of the district as a whole. Fearful that coaches in the predominantly White schools would use the transfer provision to recruit Black athletes, the district adopted a rule requiring transferring high school students to sit out a year before becoming eligible to play. Black students forced to choose between not transferring and sitting out claimed that the rule violated the Equal Protection Clause, but the court disagreed. Although the burden of the policy might fall disproportionately on Blacks, the court concluded that this result was not intentional. The policy had been adopted at the request of Black school board members in order to prevent illegal and exploitative recruiting of Black athletes and help the predominantly Black schools retain student leaders and the positive effects of successful athletic teams.[44]

White students have also claimed discrimination regarding a school transfer policy. In 1993, Ohio adopted an open enrollment law permitting students to transfer from their home school district to an adjacent district if both districts adopted policies allowing transfers. Under the law, a district could block its students from transferring out for a number of reasons including to maintain the racial balance of the district. Fearful that the open enrollment law would lead to White flight, the Akron school board adopted a policy that prohibited White students from transferring to another district. Subsequently the board also adopted a policy that blocked the transfer of nonwhite students into the district. A group of White students and parents brought suit against the policy.

Because the policy admittedly treated students differently according to their race, the court used the strict scrutiny test to evaluate its constitutionality. In finding against the policy, the court noted that the district did not have sufficiently strong evidence to prove that the open enrollment law would lead to massive White flight, that other methods were available to attract and keep students, that the policy did not have a target racial balance figure built into it, that the policy sent a message that White students were more valuable than nonwhite students, and that the policy classified students on the basis of skin color that was not necessarily indicative of their race. In short, the district failed to meet its burden of showing that the policy was necessary to the achievement of a compelling state need.[45]

In another case employing strict scrutiny, a White plaintiff was successful in obtaining a preliminary injunction blocking an affirmative action admissions policy at the Boston Latin School (BLS). The Boston public schools were seventy-one percent Black and Hispanic. The schools had operated under a court-ordered desegregation plan from 1975–1987 when they had been declared unitary. BLS was an elite public high school with competitive admissions based on a standardized test score and grades. Without an affirmative action program, the percentage of Black and Hispanic students admitted to BLS would have been fifteen percent. However, the Boston School Committee set aside thirty-five percent of the available seats for Black and Hispanic students. As a consequence of this policy, the White plaintiff was denied admission to BLS.

In deciding whether to issue the preliminary injunction, the district court said it needed to determine whether the school district had met its burden of proving that this racial set-aside was "motivated by a powerful and worthy concern" and a "plainly apt response to that concern." The district court concluded that it was possible that at trial the school district might be able to meet its burden by proving that the district's past history of de jure segregation had the lingering effect of lowering the number of Black and Hispanic applicants to BLS because so few of these applicants were admitted in previous years or by showing that achieving diversity in BLS was a compelling state interest. Nevertheless the court issued the injunction because it questioned whether the thirty-five percent set-aside was a sufficiently narrowly tailored means to achieve the district's goal. The set-aside had no termination date, and the district had not explored other "less racially preferential plans for keeping BLS accessible to 'qualified' students of all races and ethnicities," such as choosing students by lottery after a pool of eligible students had been established based on grades and test scores.[46]

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[44] Young v. Montgomery County Bd. of Educ., 922 F. Supp. 544 (M.D. Ala. 1996).

[45] Equal Open Enrollment Ass'n v. Akron City Sch. Dist., 937 F. Supp. 700 (N.D. Ohio 1996).

The *Boston Latin School* case is unusual because most affirmative action cases occur outside the context of K–12 public education. Nevertheless, the court's hesitancy to approve the plan is consistent with recent trends. In 1978, in *Regents of University of California v. Bakke*, a case that did not establish precedent but was widely followed, a fragmented Supreme Court ruled that race could be one factor in medical school admissions decisions.[47] Since that time, the Court has issued three constitutional rulings rejecting affirmative action plans and two constitutional rulings upholding affirmative action plans.[48] In a recent higher education case, the Fifth Circuit specifically declined to follow the *Bakke* decision when rejecting an affirmative action admissions program at the University of Texas law school, and the Supreme Court declined to review the case.[49] At this point, the constitutionality of affirmative action admissions programs at selective public schools must be considered uncertain.

6.6 THE EQUAL PROTECTION CLAUSE AND GENDER DISCRIMINATION

As we saw in the *Goesaert* female-bartender case (p. 187-8), rational basis was the traditional test for adjudicating cases of alleged sex discrimination. However, in 1973, the Court, in a plurality opinion, seemed to decide to employ strict scrutiny instead. In *Frontiero v. Richardson*,[50] the plurality wrote that classifications based upon sex, like those based on race, were "inherently suspect and must therefore be subjected to close judicial scrutiny." Then, in 1976, the Court retreated partway from the use of strict scrutiny in gender cases, adopting instead a new test known as **substantial relation** or the **middle-level test**. This test is far stricter than rational basis but still more lenient than strict scrutiny.

To trigger the use of the substantial-relation test, the plaintiff must first establish the existence of either overt gender discrimination (e.g., when a statute or other rule explicitly treats males and females differently), or covert gender discrimination (e.g., unadmitted preferential treatment of one gender) in the administration of government policies or practices. Once this has been accomplished, the burden of proof shifts to the government to establish that its policy serves a purpose that is both legitimate and important and that treating males and females differently is substantially related to that purpose.[51] The law will be declared unconstitutional if the government fails to meet its burden.

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[46] McLaughlin v. Boston School Comm., 938 F. Supp. 1001 (D. Mass. 1996).

[47] 438 U.S. 265 (1978).

[48] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wyngant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980). *See generally*, Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995).

[49] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) and 999 F. Supp. 872 (W.D. Tex. 1998).

[50] 411 U.S. 677 (1973).

Courts will employ the middle-level test to evaluate equal protection challenges to school policies or practices that classify students according to gender, from single-sex schools to sex-segregated sports teams. The constitutionality of a sex-segregated high school has been addressed in only one case, *Vorchheimer v. School District of Philadelphia*.[52] In *Vorchheimer*, a teenage girl sought admission to Central High School, an all-male program with high academic standards. Philadelphia also had an all-female high school, Girls High, of equal quality and prestige, as well as a number of coed high schools. The plaintiff's reasons for seeking admission to Central were outlined by the court as follows:

> As to Girls High, she commented, "I just didn't like the impression it gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it." As to Central she said, "I liked the atmosphere and also what I heard about it, about its academic excellence." She was somewhat dissatisfied with her education at George Washington High School because of her belief that the standard which the teachers set for the students was not high enough.

Nevertheless, the court, relying on the middle-level test, rejected the constitutional challenge and upheld the sex-segregated school:

> The gravamen of the plaintiff's case is her desire to attend a specific school based on its particular appeal to her. She believes that the choice should not be denied her because of an educational policy with which she does not agree.
>
> We are not unsympathetic with her desire to have an expanded freedom of choice, but its costs should not be overlooked. If she were to prevail, then all public single-sex schools would have to be abolished. The absence of these schools would stifle the ability of the local school board to continue with a respected educational methodology. It follows too that those students and parents who prefer an education in a public, single-sex school would be denied their freedom of choice. The existence of private schools is no more an answer to those people than it is to the plaintiff.

The dissenting judge argued that Philadelphia had failed to meet its burden of proof under the middle-level test.

> Some showing must be made that a single-sex academic high school policy advances the Board's objectives in a manner consistent with the requirements of the Equal Protection Clause. . . .
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> The Board, as the district court emphasized, did not present sufficient evidence that coeducation has an adverse effect upon a student's academic achieve-

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[51] Craig v. Boren, 429 U.S. 190 (1976).

[52] 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977).

> ment. Indeed, the Board could not seriously assert that argument in view of its policy of assigning the vast majority of its students to coeducational schools. Presumably any detrimental impact on a student's scholastic achievement attributable to coeducation would be as evident in Philadelphia's coeducational comprehensive schools which offer college preparatory courses as the Board suggests it would be in its exclusively academic high schools. Thus, the Board's single-sex policy reflects a choice among educational techniques but not necessarily one substantially related to its stated educational objectives. One of those objectives, in fact, is to provide "educational options to students and their parents." . . . The implementation of the Board's policy excluding females from Central actually precludes achievement of this objective because there is no option of a coeducational academic senior high school.

Litigation since *Vorchheimer* suggests that the dissenting judge's position may have been correct. In *Mississippi University for Women v. Hogan*,[53] the male plaintiff objected to the female-only admissions policy of a state nursing school. The state defended its policy by noting that it offered coeducational nursing programs at other public universities and arguing that the single sex program served the important purpose of compensating for past discrimination against women. However, the Supreme Court found the state's position deficient on both criteria of the middle-level test: The single sex admission policy served no important government purpose and was not even substantially related to the purpose proposed by the state.

> It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. . . . In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field.

On the contrary, said the Court, rather than compensating for discrimination, the admissions policy perpetuated the stereotyped view of nursing as an exclusively woman's job. That the school permitted men to audit its classes undermined its claim that the presence of men would adversely affect the performance of female students or change teaching styles and that men would dominate the classroom.

United States v. Virginia[54] was another Supreme Court case that considered the constitutionality of a state-sponsored single-sex institution of higher education. Again employing the middle-level test, the Court placed the burden on the state to come up with an "exceedingly persuasive justification" for the categorical exclusion of women from the Virginia Military Institute (VMI). The state's first argument was that offering a single-sex option contributed to the goal of making available a diversity of educational options. But the Court concluded that this goal was not served by offering a unique educational benefit only to males. The state's second argument was that the admission of women would "destroy" the VMI program, thus denying both men and women the opportunity to benefit from it. But the

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[53] 458 U.S. 718 (1982).
[54] 518 U.S. 515 (1996).

Court disagreed: "The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophecies' once routinely used to deny rights or opportunities." The Court noted that the same sorts of arguments had been made to deny women access to law and medical schools. Surely, said the Court, "the State's great goal [of educating citizen soldiers] is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the State's premier 'citizen-soldier' corps."

In a case that raised a variety of legal and educational issues, a federal district court issued an injunction prohibiting the opening of Detroit's planned all-male "Academies," elementary schools specially designed for at-risk urban boys. Plaintiffs objected to the exclusion of girls both on equal protection grounds and on the basis of two federal statutes, Title IX (see sec. 6.7) and the Equal Educational Opportunities Act (EEOA). In the opinion that follows, the court explained why it accepted plaintiff's constitutional and Title-IX-based arguments but rejected the argument based on EEOA.

GARRETT v. BOARD OF EDUCATION OF SCHOOL DISTRICT OF CITY OF DETROIT

United States District Court, Eastern District of Michigan, 1991
775 F. Supp. 1004

George E. Woods, United States District Judge

Plaintiffs filed this suit alleging the defendant Board of Education of the School District of the City of Detroit violated the Fourteenth Amendment to the United States Constitution, . . . Title IX, [and] the Equal Educational Opportunities Act . . . through the establishment of male only academies. Plaintiffs are girls enrolled in Detroit public schools and their parents.

Three male academies ("Academies") are scheduled to open on August 26, 1991. The Academies will serve approximately 250 boys in preschool through fifth grade. Grades six through eight will be phased in over the next few years. The Academies offer special programs including a class entitled "Rites of Passage", an Afrocentric (Pluralistic) curriculum, futuristic lessons in preparation for 21st century careers, an emphasis on male responsibility, mentors, Saturday classes, individualized counseling, extended classroom hours, and student uniforms.

Plaintiffs contend that these special offerings (1) do not require a uniquely male atmosphere to succeed; and (2) address issues that face all children and adolescents, including females. Plaintiffs further charge that despite the stated goal of the Academies to address the high unemployment rates, school dropout levels and homicide among urban males, the Academies do not target "at-risk" males; rather, they serve a mix of boys from all achievement levels.

Plaintiffs allege in their complaint that the defendant has deliberately chosen to disregard the rights of girls in the public school system, despite the specific advice of state governmental authorities and the federal policy requiring equal educational opportunities without regard to sex. Each of the laws allegedly violated by defendant Board is discussed below.

1. Federal . . . Constitution

Gender-based classifications implicate the protection afforded by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In *Mississippi v. Hogan*, . . . the Supreme Court held that exclusion of an individual from a publicly-funded school because of his or her sex violates the Equal Protection Clause of the Fourteenth Amendment, unless the defendant can show the sex-based "classification serves 'important governmental objectives and that the discriminatory means employed' " are "substantially related to the achievement of those objectives."

Plaintiffs maintain the Board cannot meet this standard because the Board's policy of excluding girls inappropriately relies on gender as a proxy for "at-risk" students. The Academies were developed in response to the crisis facing African-American males manifested by high homicide, unemployment and drop-out rates. While these statistics underscore a compelling need, they fall short of demonstrating that excluding girls is substantially related to the achievement of the Board's objectives. The Board has proffered no evidence that the presence of girls in the classroom bears a substantial relationship to the difficulties facing urban males.

Accordingly, plaintiffs conclude that the male academies improperly use gender as a "proxy for other, more germane bases of classification," . . . in this instance, for "at-risk" students. Specifically, the gender specific data presented in defense of the Academies ignores the fact that all children in the Detroit public schools face significant obstacles to success. In fact, in its resolution establishing the Academies, the Board acknowledged an "equally urgent and unique crisis facing . . . female students." Urban girls drop out of school, suffer loss of self esteem and become involved in criminal activity. Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system. Accordingly, plaintiffs contend there is no adequate justification for the Academies' exclusive focus on boys. . . .

2. Title IX

Plaintiffs also argue that the Academics violate Title IX of the Education Act Amendments of 1972. Title IX prohibits those educational programs receiving federal funds from treating students unequally on the basis of sex. The regulations implementing Title IX provide that students may not be given "different aid, benefits, or services" because of their sex. In addition, the regulations prohibit recipients of federal financial assistance from providing any course or otherwise carrying out any of its educational programs on the basis of sex, or from requiring or refusing participation therein by any students on such basis. The regulations also list the exceptions; that is, the types of classes which may be single sex. Because the Academies do not fall within the listed exceptions, plaintiffs conclude that they violate Title IX.

Defendant argues the plaintiffs cannot succeed on this theory because Title IX (1) excludes from coverage, admission plans in kindergarten through grade twelve; and (2) its legislative history recognized the need for continued experimentation with unique methods of education, such as the Academies.

Regarding admission plans, [Title IX] provides as follows:

> Classes of Educational Institutions Subject to Prohibition
>
> In regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

This section would allow for the selection of prospective students on the basis of sex. Therefore, defendant concludes, all things being equal, a school could be created that would admit students of only one sex. Defendant's argument is flawed. The Court views this exemption for admissions as applicable primarily to historically pre-existing single sex schools; it is not viewed as authorization to establish new single sex schools. No case has ever upheld the existence of a sex-segregated public school that has the effect of favoring one sex over another. The interplay of the Constitution and other statutes, as well as the legislative history, diminishes the persuasiveness of this argument.

The Court examines defendant's second argument, that congressional intent allows for experimentation with single sex educational options noting exceptions for military academies, social fraternities, and youth service organizations. An additional exemption is made for any public institution of undergraduate higher education that "traditionally and continually from its establishment has had a policy of admitting only students of one sex." Accordingly, the statute recognizes the value of single sex public schools and did not intend to preclude experimental programs designed as such.

Plaintiffs' claims, however, do not rest solely on the denial of admission; rather, they rely on Title IX to protect their right to the same benefits and services. Undoubtedly, plaintiffs desire access to the program offered at the Academies. Defendant, by way of the affidavit of Arthur M. Carter, Interim Deputy Superintendent of the Board, states that the educational programs are no different from the individualized instruction and benefits offered in other schools throughout the system. It is unclear, however, whether all of the course offerings available at the Academies can be had at any one school and from the evidence before the Court it appears this is not the case.

Additionally, defendant argues that the Secretary of Education has promulgated regulations under Title IX that allow the Board of Education to establish the male academies:

> If . . . a recipient has discriminated against persons on the basis of sex . . . recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.
>
> In the absence of a finding of discrimination on the basis of sex . . . recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.

The Board has reviewed the evidence and determined that conditions have resulted in limited participation of urban males in educational programs and activities. Therefore, even in the absence of a specific finding of discrimination by the Assistant Secretary of Education, the Board maintains that the regulations do not prohibit the action it has taken.

Despite the Board's stance, the Office of Civil Rights of the Department of Education, ("OCR"), the federal governmental authority charged with administrative enforcement of Title IX, has opined that all male public elementary and secondary school programs violate Title IX. Also, the Michigan State Department of Education notified defendant that the male academies violated Title IX. At this stage in the litigation this Court defers to the opinion of the OCR.

3. Equal Educational Opportunities Act

The Equal Educational Opportunities Act, ("EEOA"), 20 U.S.C. § 1701, et seq., (1990), prohibits a student assignment to a school other than a neighborhood school if reassignment "results in a greater degree of segregation of students on the basis of . . . sex . . . among the schools of such agency than would result if such students were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student." 20 U.S.C., § 1703 (1990). This act was passed to eliminate the vestiges of assignments based on racial discrimination and no mention of single sex schools ever occurred in the Senate and House debates.

The only reported decision considering the issue of sex segregation under the EEOA, *United States v. Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977), held that the sex-segregated schools violated the EEOA. The Fifth Circuit Court of Appeals concluded that the EEOA expressly "prohibits . . . sex-segregated student assignment," even if there is some educational purpose in implementing the system. Id. at 625. Plaintiffs cite this case in support of their position that the Academies violate the EEOA.

Defendant distinguishes this case factually. In *Hinds*, the school district was comprised of four schools, all of which segregated children by sex. Furthermore, the School District there argued that the assignments should be permanent. In the case at bar, the Academies are experimental in nature; the charter authorizes a three-year existence. Also, there are 251 schools in the Detroit district; the Academies number 3. Finally, the defendant argues that a female academy will be established "soon."

Defendant also argues that the EEOA section cited by plaintiffs is inapplicable as it deals with "the assignment" by an educational agency whereas students are not assigned to any school by the Board. Rather, the students at the Academies are volunteers.

Plaintiff responds to these arguments as follows: the EEOA does not make exceptions for "separate but equal" programs; if Congress wished to create an exception to the provision of the EEOA for "voluntary freedom of choice" plans, it could have done so.*

Because the only applicable case is so easily distinguished, the Court finds the plaintiffs have not demonstrated probability of success sufficient to meet their burden as to this cause of action.

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*Exempting freedom of choice plans would have destroyed the effectiveness of the EEOA by permitting a school board to allow white students to "voluntarily" transfer into race-segregated schools so long as the board did not make such assignments.

◆

Garrett makes it questionable whether there are any circumstances that would allow a school board to create new single-sex schools. Parallel boys' and girls' programs of equal quality might pass constitutional muster if supported by stronger research evidence of the efficacy of single-sex schooling than currently exists. However, like *Garrett*, most cases alleging gender discrimination in education rely on a combination of constitutional and statutory theories, so even if constitutional, single-sex schools might still be impermissible.

The most common gender discrimination cases in elementary and secondary schools involve sex segregation in sports or occasionally, in student organizations. Female plaintiffs have their strongest chance of winning a case under the Equal Protection Clause when they have been totally excluded from playing a sport because of the absence of a girls' team. For example, in *Force v. Pierce R-VI School District*,[55] the court employed the middle-level test in ruling in favor of a girl who wished to try out for her junior high football team. Noting that even the smallest and frailest boys were allowed to try out for the team, the court rejected the school's contention that excluding girls from football was substantially related to the goal of ensuring the safety of the players. The court explained its conclusion as follows:

> Nichole Force obviously has no legal entitlement to a starting position on the Pierce City Junior High School eighth grade football team, since the extent to which she plays must be governed solely by her abilities, as judged by those who coach her. But she seeks no such entitlement here.
>
> Instead she seeks simply a chance, like her male counterparts, to display those abilities. She asks, in short, only the right to try.
>
> I do not suggest there is any such thing as a constitutional "right to try." But the idea that one should be allowed to try—to succeed or to fail as one's abilities and fortunes may dictate, but in the process at least to profit by those things which are learned in the trying—is a concept deeply engrained in our way of thinking, and it should indeed require a "substantial" justification to deny that privilege to someone simply because she is a female rather than a male. I find no such justification here.

When a comparable girls' team is available, a girl's chance of winning the right to try out for the boys' team is diminished if the sport involves contact.[56] In cases involving noncontact sports, girls have a good chance of winning, especially if a girls' team is not available.[57] But some courts have upheld the notion of separate but equal even for noncontact sports.[58]

The legal situation is even less clear regarding boys seeking to participate in noncontact girls' sports. When there is no boys' team available, male plaintiffs have met with mixed results.[59] Some courts have been persuaded that girls' teams are important for ensuring girls a fair opportunity to participate in sports. One court rejected both the constitutional and statutory arguments of a boy seeking to play on a girls' field hockey team.[60]

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[55] 570 F. Supp. 1020 (W.D. Mo. 1983).

[56] O'Connor v. Board of Educ. of Sch. Dist. 23, 545 F. Supp. 376 (N.D. Ill. 1982) and 449 U.S. 1301 (1980).

[57] Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Gilpin v. Kansas State High Sch. Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973).

[58] Bucha v. Illinois High Sch. Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972).

[59] Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982); Petrie v. Illinois High Sch. Ass'n, 394 N.E.2d 855 (Ill. App. Ct. 1979); *but see*, Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

6.7 FEDERAL ANTIDISCRIMINATION STATUTES

Several federal statutes supplement the Equal Protection Clause by prohibiting various forms of discrimination. This section considers two of these statutes, Title VI of the Civil Rights Act of 1964, concerning the treatment of racial and ethnic minority group students, and Title IX of the Education Amendments of 1972, dealing with gender discrimination. (See chap. 9 for a discussion of federal statutes prohibiting discrimination in employment.)

Title VI (section 601) of the **Civil Rights Act of 1964** provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[61] A school district that violates this law faces the loss of all its federal funds. Title VI applies to everything a school does even if only one program or activity receives federal funds. Thus, for example, if a school receives federal support for its lunch program, it must comply with Title VI in all its activities.

Title VI supplements the Equal Protection Clause in three ways. First, although the Equal Protection Clause can be enforced only through a suit brought by parents or students directly affected by discrimination, Title VI can be enforced by the attorney general of the United States,[62] by any federal department or agency that awards federal funds to school districts,[63] or through litigation brought by an individual.[64] Although this issue has not been decided, it seems possible that courts may use Title VI to award compensatory and punitive damages to individual victims of discrimination by school districts.[65] Second, unlike the Equal Protection Clause, proof of intent to discriminate may not be necessary under Title VI. If a federal agency has promulgated regulations implementing Title VI, and the regulations interpret Title VI to prohibit policies having a discriminatory impact, then proof of a discriminatory impact alone will be sufficient to prove a Title VI violation.[66] Thus, unintentional discrimination may sometimes be remedied through Title VI. Third, unlike the Equal Protection Clause, Title VI applies to private as well as public schools provided they receive federal funds. The Department of Education regulations implementing Title VI state that a school district may not provide different or separate treatment or services or segregate on the grounds of race, color or national origin.[67]

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[60] Williams v. School Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993).

[61] 42 U.S.C. § 2000d.

[62] 42 U.S.C. § 2000c-6.

[63] 42 U.S.C. § 2000d-1.

[64] Alexander v. Choate, 469 U.S. 287 (1985); Guardians Ass'n v. Civil Serv. Comm., 463 U.S. 582 (1983).

[65] *Cf.*, Franklin v. Gwinnett County Sch., 503 U.S. 60 (1992).

[66] Guardians Ass'n v. Civil Serv. Comm., 463 U.S. 582 (1983).

Title IX of the Education Amendments of 1972[68] closely parallels Title VI: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Federal law makes it clear that Title IX applies to everything a school does even if only one activity or program receives federal funds.[69] Thus, a school's athletic program is subject to Title IX regulations even if the school's only federal funds are for special education. Like Title VI, Title IX permits lawsuits by both federal agencies and individuals[70] and applies to any private or public school that gets federal funds.

Student victims of gender discrimination may use Title IX to seek a court order ending the discrimination. Student victims of intentional gender discrimination may also be awarded monetary damages from the offending school district but not from individual perpetrators of discrimination.[71] The courts are split on whether victims of gender discrimination may use another federal law, known as Section 1983 (see sec. 12.9) to seek monetary damages from individual perpetrators of discrimination.[72] The courts are also split on the issue of whether Title IX prohibits unintentional gender discrimination.[73] Although the Supreme Court has not ruled on this issue, if its interpretation of Title VI were applied to Title IX, some unintentional gender discrimination could be prohibited.[74]

The extensive regulations issued to enforce Title IX prohibit the following:

- Courses or other activities segregated on the basis of sex, except contact sports offered in physical education and sex education offered in elementary grades. Vocal ranges may also be taken into account in choral groups.[75]
- Admission tests that disproportionately affect one sex, unless they can be validated as reliable predictors of educational ability and as the least prejudicial means of prediction.[76]
- Codes of student conduct that treat males and females differently.[77]

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[67] 34 C.F.R. § 1003 (b).
[68] 20 U.S.C. §§ 1681–1686.
[69] 20 U.S.C.A. § 1687.
[70] Cannon v. University of Chicago, 441 U.S. 677 (1979).
[71] Franklin v. Gwinnett County Sch., 503 U.S. 60 (1992).
[72] *See, e.g.*, Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993) (Title IX preempts use of section 1983); *contra*, Seamons v. Snow, 84 F.3d 1226 (10 Cir. 1996); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996).
[73] Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981); NAACP v. Medical Ctr. Inc., 657 F.2d 1322 (3d Cir. 1981).
[74] Guardians Ass'n v. Civil Serv. Comm., 463 U.S. 582 (1983).
[75] 34 C.F.R. § 106.34.
[76] 34 C.F.R. § 106.21(b)(2).
[77] 34 C.F.R. § 106.31(b)(4).

- Counseling materials that discriminate on the basis of gender, for example by encouraging different courses or occupations for different sexes.[78]
- Rules concerning marriage or pregnancy that treat students differently on the basis of sex. Thus, students may not be denied educational benefits because they are pregnant.[79]

In the *Garrett* case (see sec. 6.6), a federal judge relied partly on Title IX regulations to prohibit the opening of all-male elementary school "academies" in the city of Detroit.

The following Title IX regulation, Section 106.41, has had a profound effect on schools:

> **Athletics**
>
> (a) *General*. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> (b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
>
> (c) *Equal opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provision of equipment and supplies;
> (3) Scheduling of games and practice time;
> (4) Travel and per diem allowance;
> (5) Opportunity to receive coaching and academic tutoring;
> (6) Assignment and compensation of coaches and tutors;
> (7) Provision of locker rooms, practice and competitive facilities;
> (8) Provision of medical and training facilities and services;
> (9) Provision of housing and dining facilities and services;
> (10) Publicity.
>
> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary

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[78] 34 C.F.R. § 106.36.
[79] 34 C.F.R. § 106.40.

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> may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

These regulations have created some confusion. Section 106.41 allows sex-segregated teams in the following circumstances: contact sports regardless of whether there is a team available for the excluded sex, noncontact sports selected on a competitive basis when there is a team available for each sex, and noncontact sports selected on a competitive basis when only one team is available provided that athletic opportunities for the excluded sex have not previously been limited, such as by inferior funding or facilities. Thus, the regulations seem to permit separation when many of the constitutional decisions reviewed in sec. 6.6 would not. For example, as in the *Force* case, female athletes have sometimes employed the Equal Protection Clause to gain the right to try out for male teams even in contact sports. At least in those jurisdictions where these decisions have occurred, the conflicting federal regulations may not be implemented because the Constitution takes precedence over all other laws and regulations.

In addition to federal law, some states have constitutional provisions, statutes, and regulations that also prohibit various forms of discrimination. State law may and in some states does impose stricter antidiscrimination requirements than federal law. For example, state law may ensure greater opportunities for female students to try out for male teams than federal law.[80]

6.8 RACIAL AND SEXUAL HARASSMENT

Racial and sexual harassment were first recognized as legally impermissible forms of discrimination in the context of employment law. The implementing regulations of Title VII of the Civil Rights Act of 1964 proclaim that an employee may not be subjected to a racially or sexually hostile, intimidating, or offensive work environment. In addition to hostile-environment harassment, the regulations also recognize another form of sexual harassment known as "quid pro quo." In quid-pro-quo harassment, an employee is asked to exchange sex for job benefits. (See sec. 9.4.)

In recent years, students have looked to the law to protect them against racial or sexual intimidation and improper sexual advances while at school. Courts have become increasingly sympathetic to the idea that students have a right not to be subjected to racial or sexual harassment by school employees or even by other students. Both hostile-environment racial or sexual harassment and quid-pro-quo sexual harassment against students are now recognized as legal wrongs.

Under certain narrowly defined circumstances, the Constitution may protect students against harassment. The Equal Protection Clause applies only when the offender is a school official, not a fellow student,[81] and only when the victims can show that the offending conduct was intentionally discriminatory against their race or gender. In one case, a gay male student won an equal-protection suit against school officials who had a policy of protecting female students from sexual harassment, but who for years had refused to protect the student from physical assault. The gay student was taunted, urinated upon, and even kicked so forcefully that he sustained internal injuries, but despite repeated protests to school officials nothing was done. The peer harassment itself was not an Equal Protection Clause violation, but the discriminatory protection policy was.[82] The Due Process Clause also may be used to object to sexual harassment when there has been a significant violation of bodily integrity and again only when the offender is a school official. Thus, one student successfully brought a due process suit against a teacher who repeatedly had sexual intercourse with her.[83]

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[80] Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (en banc).

[81] DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989).

Where there has been threatened or actual bodily harm or violation (e.g., sexual intercourse), the racial or sexual harassment may constitute assault or battery under state civil and criminal law (see sec. 12.1). However, in most cases, the most effective protection for students against racial or sexual harassment at school is found in federal statutes. In recent years, the Department of Education (ED) and the courts have come to view racial harassment of a student as a violation of Title VI and sexual harassment of a student as a violation of Title IX. The idea is that students who experience racial or sexual harassment are being denied the benefits of their school's program on the basis of race or gender so harassment is a form of discrimination.

According to ED guidelines, racial[84] or sexual[85] harassment occurs when because of race or gender a student experiences conduct "by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment." The guidelines provide a list of factors to be used in determining whether racial or sexual harassment has occurred including the type, frequency and duration of the conduct; the number of individuals involved; and whether the victim suffered falling grades or psychological distress. The guidelines specifically state that the more severe the conduct, the less it need be persistent to constitute a violation. "Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment."

Because there has been more litigation over sexual than racial harassment in schools, the law regarding sexual harassment is far more developed. The ED guidelines state that "[s]exually harassing conduct . . . can include unwelcome sexual advances, requests for sexual favors, and other verbal and nonverbal, or physical conduct of a sexual nature." However, Title IX does not prohibit nonsexual touching or other nonsexual conduct. "For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment." Similarly, "[a] kiss on the cheek by a first grader does not constitute sexual harassment." But, "[a] teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment." Thus, in a recent case, a court found that a school employee who on several occasions touched a student's breast, buttocks, and thigh and made sexual comments to her had committed wrongful sexual harassment.[86]

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[82] Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

[83] Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996).

[84] 59 Fed. Reg. 11447.

[85] 62 Fed. Reg. 12033.

In general, sexual conduct directed at a student by an adult school employee constitutes harassment even if the student does not object or appears to welcome the conduct. ED guidelines state that the younger the student, the less likely the student will be deemed to have the legal capacity to consent to sexual conduct. The Seventh Circuit ruled that a thirteen-year-old plaintiff did not need to establish in a Title IX suit that she did not welcome the sexual advances—suggestive notes, phone calls, touching and kissing—of a teacher.[87] For older high school students, ED guidelines create a rebuttable presumption that a sexual relationship with an adult school employee is not consensual. The Supreme Court has stated that sex between a student and a school employee usually constitutes sexual harassment even if the student consents.[88]

Sexual conduct by one student towards another may constitute harassment if the conduct is unwelcome and persistent or severe. One court concluded that a student had been subjected to hostile-environment harassment when another student persistently touched her, brushed up against her, and made sexual comments to her.[89] Not every form of unwanted harassment is sexual, however. In one case, a high school football player's upper class teammates subjected him to an incident of sadistic treatment including binding his genitals with adhesive tape. The student reported the incident to school authorities who punished the wrongdoers and forced the team to forfeit a scheduled play-off game. The victim was then subjected to nonsexual hostile acts by team members who blamed him for the forfeit. The court ruled that the hostile environment subsequent to the initial incident was not covered by Title IX.[90] Similarly, for gay students, the ED draws a distinction between nonsexual comments by other students such as, "[g]ay students are not welcome at this cafeteria table," which, although offensive, would not violate Title IX and harassment of a sexual nature, which would.

ED guidelines state that quid-pro-quo harassment occurs when a

> school employee explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the stu-

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[86] Seneway v. Canon McMillan Sch. Dist., 969 F. Supp. 325 (W.D. Pa. 1997). *See also*, Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995), *aff'd*, 143 F.3d 473 (9th Cir. 1997).

[87] Mary M. v. North Lawrence Community Sch. Corp., 131 F. 3d 1220 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2369 (1998).

[88] Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998).

[89] Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), *vacated*, 91 F.3d 1418, *aff'd*, 120 F.3d 1390 (11th Cir. 1997) (en banc), 119 S. Ct. 1661 (1999); *see also*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996).

[90] Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996).

> dent's submission to unwelcome sexual advances, requests sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. . . . Quid pro quo harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm.

For example, one court ruled that quid-pro-quo sexual harassment occurred when a teacher allowed a third grade student to copy answers from materials on the teacher's desk while the teacher sexually touched the student.[91]

When racial or sexual harassment occurs at school, who may be held responsible and what sort of compensation may be awarded? Because Title VI and Title IX only apply to "programs . . . receiving federal financial assistance," neither individuals who commit racial or sexual harassment nor their supervisors may be sued directly under these laws.[92] Employees who racially or sexually harass students in violation of Title VI or IX may be sued and forced to pay money damages under another federal statute known as Section 1983 if certain conditions are met (see sec. 12.9).[93] Peer harassers may not be sued under Section 1983, but some courts allow Section 1983 suits against principals and other supervisors of either employee or peer harassers. The Sixth Circuit has said that supervisors can only be held liable under Section 1983 if they "at least implicitly authorized, approved or knowingly acquiesced" to the harassment or displayed "deliberate indifference."[94] The Ninth Circuit has held that "liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, . . . for his acquiescence in the [legal] deprivation, . . . or for conduct that showed reckless or callous indifference to the rights of others."[95]

In *Franklin v. Gwinnett County Public Schools*,[96] the Supreme Court held that victims of gender discrimination under Title IX including sexual harassment may sue their school district for money damages. Presumably, the same would hold true for victims of racial harassment under Title VI. It is not clear whether damages are limited to compensation or whether punitive damages may be awarded.[97]

In *Gebser v. Lago Vista Independent School District*,[98] the Supreme Court ruled that a school district cannot be held responsible for sexual harassment of a student by an employee

> unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [school's] behalf has

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[91] Does v. Covington County Sch. Bd. of Educ., 969 F. Supp. 1264 (M.D. Ala. 1997).

[92] Smith v. Metropolitan Sch. Dist. of Perry Township, 128 F.3d 1014 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2367 (1998).

[93] Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995), *aff'd*, 143 F.3d 473 (9th Cir. 1997); *but see*, Does v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554 (M.D. Ala. 1996) and 969 F. Supp. 1264 (M.D. Ala. 1997).

[94] Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996). *See also*, Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994).

[95] Larez v. Los Angeles, 946 F.2d 630 (9th Cir. 1991).

[96] 503 U.S. 69 (1992).

[97] Doe v. Oyster River Co-Op Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997).

[98] 118 S. Ct. 1989 (1998).

> actual knowledge of discrimination in the [school's] programs and fails adequately to respond. . . . [M]oreover, the response must amount to deliberate indifference to discrimination. . . . The premise, in other words, is an official decision by the [school district] not to remedy the violation.

Applying these principles to the case at hand the Court noted that the student-victim had not reported her sexual intimacy with the teacher to the school principal and that the only warning signs the principal had were complaints from other parents regarding sexually suggestive comments by the teacher in class. When the school did finally learn of the sexual relationship, the teacher was fired and lost his teaching license. Thus, the facts did not prove that the principal or the district had actual knowledge of the discrimination and failed to respond.

Regarding peer harassment, the Supreme Court in *Davis v. Monroe County Board of Education*[99] ruled that a school district can be held liable for student-on-student sexual harassment when four conditions are met. First, the plaintiff must establish that the peer sexual harassment was so severe, pervasive, and objectively offensive that it undermined and distracted the plaintiff's educational experience to the point that the plaintiff was denied equal access to the school's resources and opportunities. The Court noted that simple acts of teasing and name-calling by students, even when these comments draw distinctions based on gender, would not create district liability. Nor would a single instance of severe one-on-one peer harassment expose a district to liability. Also, the Court stated that a drop in grades by itself would not be sufficient to prove the severity of the harassment. Second, the harassment must occur in a context with regard to which the district has substantial control over both the harasser and the context in which the harassment occurs, for example, during school hours and on school grounds. Third, the school district must have actual knowledge of the harassment. The Court did not specify, however, who must know about the harassment; arguably it would be sufficient if a single teacher was aware of the harassment. Fourth, there must be proof that the school district was deliberately indifferent to the known acts of peer sexual harassment. The district's obligation is to respond in a manner that is not clearly unreasonable. A total failure to respond or a response that exhibited discrimination in the enforcement of the school's rules—for example protecting girls but not boys or Whites but not Blacks from harassment—are two examples of unreasonable responses. The Court acknowledged it would be reasonable for an institution to refrain from disciplinary action that would itself expose it to constitutional or statutory claims.

Based on these principles, the Court reversed the decision of the Eleventh Circuit dismissing the complaint of LaShonda Davis, a fifth grade student who was the victim of a classmate's repeated acts of harassment for five months. Explaining its reason for allowing the case to go to trial, the Court said:

> The harassment was not only verbal; it included numerous acts of objectively offensive touching, and indeed, G.F. [the harasser] ultimately pleaded guilty to criminal sexual misconduct. Morever, the complaint alleges that there were mul-

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[99] 119 S. Ct. 1661 (1999).

> tiple victims who were sufficiently disturbed by G.F.'s misconduct to seek an audience with the school principal. Further, petitioner [LaShonda's mother] contends that the harassment had a concrete negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment.

To satisfy their moral and legal duty to their students and minimize their risk of legal liability, schools should adopt, publish, and abide by formal antidiscrimination and antiharassment policies. ED Title IX guidelines state that schools are required to "to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment and to disseminate a policy against sex discrimination."[100] Title VI guidelines specify that "once a [school] has notice of a racially hostile environment, the [school] has a legal duty to take reasonable steps to eliminate it. . . . In evaluating a [school's] response to a racially hostile environment, [ED] will examine disciplinary policies, grievance policies, and any applicable antiharassment policies."[101]

6.9 SUMMARY

The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the government from treating individuals or groups differently without adequate justification. This prohibition has been the basis of numerous lawsuits attacking segregation and other forms of discrimination in public schools. The Supreme Court has fashioned three separate tests for deciding equal protection cases:

1. **Strict scrutiny.** When government admits or a plaintiff successfully demonstrates that the criterion of classification and differential treatment is race or ethnicity, courts employ the strict scrutiny test. This test requires that the government justify its policy of differential treatment by showing that it is necessary to the accomplishment of a compelling state purpose. Except regarding certain affirmative action policies, this is a requirement that government can virtually never meet.
2. **Substantial relation.** When it is admitted or demonstrated by a plaintiff that government is classifying on the basis of gender, courts employ the substantial relation or middle-level test. This test, although not nearly as stringent as strict scrutiny, still places the burden for justifying the policy of differential treatment on the government. Gender-based classifications will be upheld only if the government can demonstrate that

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[100] 62 Fed. Reg. 12040.
[101] 59 Fed. Reg. 11451.

they are substantially related to the achievement of an important government purpose. Unlike strict scrutiny, this is a test that the government sometimes can meet.

3. **Rational basis.** Classifications based on characteristics other than race, ethnicity, or gender (with several minor exceptions not usually relevant to education cases) are evaluated using the least stringent test. Rational basis places the burden on the plaintiff to show that differential treatment by the government is wholly unrelated to any legitimate state goal. Under this test, classifications that in any way foster or promote any legitimate goal of the government will be upheld.

As a practical matter, the Equal Protection Clause prohibits any policy or practice that intentionally segregates students on the basis of race or ethnicity or intentionally provides a racial or ethnic minority group with an inferior education. A policy or practice will be viewed as intentionally segregative or otherwise discriminatory if it purposely seeks to separate or otherwise disadvantage a minority group. Thus, any conscious decision by an educational policy maker or practitioner to separate students by race will not pass constitutional muster. Actions may also be viewed as discriminatory if a rational decision maker should have realized that the major result of the action would be to disadvantage or segregate a minority group. However, policies that have an accidental or unforeseeable disadvantageous effect on a particular racial group do not violate the Equal Protection Clause.

Beginning in 1954 with *Brown v. Board of Education*, many school districts have been found guilty of intentional racial segregation and discrimination. Federal courts are authorized to order a variety of remedies for de jure segregation including redrawing of attendance areas, busing, magnet schools, and remedial educational programs. Courts may not, however, transfer pupils into or out of districts that have not been found de jure segregated in order to desegregate adjacent districts. Some formerly segregated districts have fully complied with court-ordered desegregation and been declared unitary and others continue to be supervised by the courts.

The Equal Protection Clause also prohibits educational practices that disfavor either gender unless there is very strong justification. Most programs that intentionally separate the sexes are prohibited. The major exception is athletics, but there is some uncertainty in the law.

In addition to the Equal Protection Clause, Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 prohibit discrimination in education on the basis of race and gender, respectively. These statutes supplement the Constitution in a number of ways, most importantly by providing remedies for discrimination not available under the Equal Protection Clause. Title VI and Title IX also provide a great deal of specificity concerning prohibited discriminatory practices. Title IX requires equity in school athletic programs. The statutes also define racial and sexual harassment as impermissible forms of discrimination and require that schools adopt and enforce a program designed to prevent racial and sexual harassment of students by school employees or fellow students.

Failure to do so may leave the school, and, in some cases, individual educators vulnerable to lawsuits for monetary damages.

Legal issues aside, schools should avoid policies of classification based on race, ethnicity, or gender without strong justification. Except in extraordinary circumstances, sound educational practice dictates treating Blacks the same as Whites and males the same as females. Thus, to avoid violating the Equal Protection Clause with regard to race and gender, school officials need only exercise sound educational judgment and common sense.

CHAPTER 7

STUDENTS WITH SPECIAL NEEDS

The last chapter showed that the Equal Protection Clause prohibits most race- and gender-based classifications by public schools and that classification based on other characteristics may be justified if it is rationally related to legitimate government goals. Chapter 7 considers some criteria that do justify differential educational treatment: various types of disabilities, limited English proficiency, age, and educational ability. Unlike race and gender, these characteristics may be related to an individual's need for and ability to benefit from education, and, to the extent that they are, they may be the basis for determining the educational program that an individual receives.

This does not mean, however, that schools are free to provide whatever education they choose to students who vary with regard to these characteristics. Both the Constitution and extensive federal legislation and regulations demand that even though the programs offered to special-needs students may differ from the norm, they must, nevertheless, satisfy the requirement of equality of educational opportunity for all. In fact, with regard to disabled and limited-English-speaking students, equality of opportunity may require that a different and perhaps more extensive program be offered.

All this can get very complex: How much education are disabled children entitled to? May "uneducable" students be excluded from school? Must the school take special steps to assist students who come speaking a language other than English? Do English as a Second Language (ESL) programs satisfy the school's obligation to non-English speakers? Do exceptionally bright students have a constitutional right to skip a grade? This chapter addresses questions like these.

7.1 HISTORICAL PERSPECTIVES: THE EDUCATION OF DISABLED CHILDREN

In 1970 there were about eight million disabled children in the United States. Three million of these children were not receiving an appropriate education and another million were wholly excluded from public education. Exclusion of disabled children was legally possible because many states' laws excused disabled children from compliance with compulsory education laws. State courts generally upheld policies of excluding disabled children from the public schools.[1]

In the early 1970s, the exclusion of disabled children from public schooling became the target of a number of federal lawsuits, most notably *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth*,[2] and *Mills v. Board of Education*.[3] Although the cases differed somewhat, the major findings of both courts were similar: (a) children were excluded from the public schools because they were disabled, (b) the effect of this policy was wholly to deprive these children of access to a publicly funded education, (c) the government's purpose in excluding them was to save money, (d) excluding disabled children from school was not rationally related to the goal of saving money (or to any other legitimate state goal) because uneducated people (disabled or not) were likely to become a much greater financial burden on the state than if they had been educated, and (e) exclusion of disabled children from public schools violated the Equal Protection Clause.

The opinions concluded by laying down both substantive and procedural requirements. Disabled children must be admitted to the public schools and provided adequate or appropriate educational services suited to their individual needs. Schools must follow certain procedures when they classify disabled pupils, decide on their appropriate educational placements, reclassify, or change placement.

The *Mills* and *PARC* cases were part of a nationwide campaign that included not only lawsuits but also political efforts to get better educational services for disabled children through legislation. This campaign has resulted in three major federal statutes designed to ensure effective education and equitable treatment for disabled children:

- the Rehabilitation Act of 1973,[4] often called "Section 504" or "RHA,"
- the Americans with Disabilities Act[5] of 1990 (ADA), and
- the Individuals with Disabilities Education Act[6] (IDEA), originally passed in 1975 and extensively modified and amended since. IDEA was originally

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[1] State v. Board of Educ. of Antigo, 172 N.W. 153 (Wis. 1919).

[2] 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972).

[3] 348 F. Supp. 866 (D.D.C. 1972).

[4] 29 U.S.C. §§701 et seq.

[5] 42 U.S.C. §§12101–12213.

[6] 20 U.S.C. §§1400–1485.

called the Education for All Handicapped Children Act (EAHCA) and also was known at one time as the Education of the Handicapped Act (EHA). The most recent major revision of IDEA occurred in 1997.

Together with related state laws and extensive federal and state regulations, these laws provide the legal framework for the education of disabled students. The constitutional rights of disabled children have not been fully explored by the courts because as a practical matter the statutes seem to satisfactorily address the demands of parents of disabled children for educational services at public expense.[7]

Although the IDEA is the most well known of the statutes regulating the education of disabled students, RHA and ADA are significant as well. IDEA is a funding program with requirements that extend only to states that accept funds under the Act. If it were not for the similar requirements imposed by RHA and ADA, states could choose to avoid their IDEA-imposed obligations by declining to accept the funds.[8] Additionally, as discussed in the next section, the scope of RHA and ADA is in some ways broader than that of IDEA. RHA and ADA extend protection to students and other individuals who are not covered by IDEA, impose obligations on schools and in situations that IDEA does not reach, and prevent forms of disability-based discrimination beyond the scope of IDEA. Nevertheless, as explained in sec. 7.3, both as a matter of law and as a practical matter, IDEA is by far the most influential statute in controlling the education of disabled children.

7.2 THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

The heart of the RHA is Section 504:[9] "No otherwise qualified individual with handicaps . . . shall solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." The Act applies to all public and private schools that receive federal financial assistance and protects not just disabled students but *any person* "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Thus, RHA, unlike IDEA, regulates a school's relationship not only with qualifying students but also with qualifying teachers and other employees (see sec. 9.6).

Under certain circumstances, even qualifying parents may be covered. For example, the Second Circuit has ruled that the RHA requires a school to provide a sign language interpreter at district expense to deaf parents of hearing children at school-initiated activities related to the academic or disciplinary aspects of their children's education. The school's obligation, however, does not include providing an interpreter at school extracurricular activities.[10]

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[7] *But see*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

[8] New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

[9] 29 U.S.C. §§701 et seq.; except as otherwise noted the discussion of RHA is based on the statute and RHA regulations, Volume 34 C.F.R.

RHA defines "major life activities" to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Thus, unlike IDEA, which only covers students who currently need special education, RHA protects children with a wide range of "impairments," those with a history of life-limiting impairments, and even those who are regarded as having such an impairment. For example, students with epilepsy or physical disabilities or attention deficit hyperactivity disorder (ADHD) are covered by RHA even though some of them may not qualify for special education under IDEA. RHA prohibits not just actions taken with an intent to discriminate but also actions having the unintentional effect of discriminating.[11]

The educational program requirements of RHA generally parallel those of IDEA but with less detail. Qualifying students must be provided with an individualized educational program designed to meet their needs as adequately as the program provided to other students meets their needs. Both academic and nonacademic activities are subject to this equivalency requirement. Like IDEA, RHA requires that disabled students be thoroughly evaluated and periodically reevaluated, that they be educated to the maximum extent possible with nondisabled peers, and that parents be involved in the development of educational programs for their disabled children. For the most part, for students who also qualify under IDEA, compliance with IDEA will usually satisfy the educational requirements of RHA. In addition, RHA prohibits discrimination against disabled students in the provision of services and materials, requires that school facilities be made accessible to disabled students, mandates modifications in classrooms, "reasonable accommodations" in courses (e.g., teaching techniques, exam procedures), and the provision of auxiliary aids and devices.

The basic mandate of the ADA[12] is that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity." The term "qualified individual with a disability" means an individual with a disability who with or without "reasonable modifications" to rules, policies, or practices, the removal of architectural and communication barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in the program.

Whereas RHA regulates only entities that receive federal financial assistance, ADA applies to all "public entities" and "places of public accommodation." This includes any public or private business or agency providing goods or services to the public, including virtually all public and private schools except private religious schools, which are explicitly excluded.

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[10] Rothschild v. Grottenthaler, 907 F.2d 286 (2d Cir. 1990).

[11] New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

[12] 42 U.S.C. §§12101–12213; except as otherwise noted, the discussion of ADA is based on the statute and ADA regulations, Volumes 28, 29, 34, & 36 C.F.R.

Where there is overlap between the two laws, the requirements of ADA are the same as RHA. Like RHA, ADA extends coverage to individuals with or perceived as having a wide range of "physical or mental impairment."

Among the five main titles of ADA, Titles II and III are directly relevant to the treatment of students. Title II protects disabled individuals from discrimination in the provision of services by public agencies such as schools. Title II requires that public schools be made accessible to disabled individuals such as by modification or removal of "architectural, communication or transportation barriers" or the "provision of auxiliary aids and services." Title III of the ADA prohibits discrimination by private entities that do business with the public. Private schools at all levels, except private religious schools, are specifically included. In general, ADA places the same requirements on public school programs as RHA and IDEA, and public school programs that satisfy the requirements of RHA and IDEA also satisfy ADA.

Under ADA, discrimination is broadly defined to include:

- using eligibility criteria that screen out the disabled from goods, services, facilities, privileges, advantages, and accommodations.
- failure to make reasonable modifications in policies and practices to assure the disabled are afforded goods, services, facilities, privileges, advantages and accommodations. However, modifications and adjustments are not required if they would fundamentally alter the goods, services, facilities, privileges, advantages, or accommodations provided. Also, the removal of architectural or communication barriers is required only if removal is "readily achievable."
- failure to provide auxiliary aids and services to assure the disabled are not excluded from goods, services, facilities, privileges, advantages, and accommodations.

At the heart of the RHA and the ADA is the requirement that disabled people not be treated differently solely by reason of their disability. Regulations prohibit imposing a surcharge on disabled students for attending after-school programs or on disabled parents for making school functions accessible to them such as by provision of a sign language interpreter. A school may not exclude a student from equal services because the student has an association with someone with a known disability; for example, excluding a child from sports because a sibling is HIV-positive is prohibited.

Both the RHA and the ADA require that school facilities be accessible to students and their parents; however, schools need not make every part of a facility accessible as long as their programs and activities when viewed in their entirety are readily accessible. Also, alterations that would fundamentally alter a program or activity or result in an undue financial and administrative burden need not be undertaken. The regulations implementing ADA list the types of alterations that should be made, including installing ramps, reconfiguring toilet facilities, and providing a reasonable number of wheelchair spaces dispersed throughout seating areas.

Two central issues, first litigated under RHA but relevant to understanding both laws, are: who counts as a disabled person and which disabled persons are "otherwise qualified." On the first issue, the Supreme Court has ruled that the law protects people with contagious diseases (e.g., tuberculosis), even if the disease does not incapacitate them, because they are regarded as having an impairment of activity.[13] Lower courts have extended coverage to teachers and students with AIDS.[14] The ADA specifically excludes people who are engaged in the illegal use of drugs from the coverage of either law, but otherwise qualifying individuals who are former users of illegal drugs are not excluded.

The issue of what constitutes an "otherwise qualified" individual was addressed by the Supreme Court in *Southeastern Community College v. Davis*.[15] The case concerned a woman denied admission to a nurse's training program because her hearing disability prevented her from benefiting sufficiently from the program or performing the tasks of the profession. The Court ruled against the woman, saying that an "otherwise qualified" disabled person was "one who is able to meet all of a program's requirements in spite of his handicap," not one "who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap."

A number of disabled students have attempted to rely on RHA and ADA to object to academic or other eligibility requirements for school sports teams; however, courts have consistently found that eligibility requirements that serve a valid purpose and apply equally to disabled and nondisabled students alike do not violate the law. Both the Sixth and Eighth Circuits have upheld rules setting a maximum age for participation in interscholastic sports. The rules had the effect of excluding disabled students who because of their disability were in school beyond the usual graduation age. Nevertheless, the Sixth Circuit said that an exclusion based on age is not an exclusion based on disability, and that absent their disabilities, the plaintiffs would still have failed to satisfy the age requirement.[16] The Eighth Circuit said that age was an essential eligibility requirement designed to promote safety for all participants. Because the plaintiff could not meet the requirement, he was not "otherwise qualified" unless "reasonable accommodation" could enable him to meet the requirement. However, waiving the age requirement would not be a "reasonable accommodation," but rather a "fundamental alteration" of the sports program.[17] In a similar suit attacking minimum grade point average and credit eligibility requirements, the disabled student also lost.[18] Several courts have ruled against schools excluding a student with one eye or one kidney from contact sports.[19]

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[13] School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

[14] Robertson v. Granite City Comm. Unit Sch. Dist. 9, 684 F. Supp. 1002 (S.D. Ill. 1988); Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988).

[15] 442 U.S. 397 (1979).

[16] Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995).

[17] Pottgen v. Missouri State High Sch. Athletic Ass'n, 40 F.3d 926 (8th Cir. 1994), *rev'd on other grounds*, 103 F.3d 720 (8th Cir. 1997).

[18] Hoot v. Milan Area Sch., 853 F. Supp. 243 (E.D. Mich. 1994).

[19] Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (E.D. Pa. 1982); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).

Brookhart v. Illinois State Board of Education[20] considered the legality under RHA of requiring disabled students to pass a minimum competency test (M.C.T.) in order to graduate from high school. Said the court:

> Plaintiffs in this case have no grounds on which to argue that the contents of the M.C.T. are discriminatory solely because handicapped students who are incapable of attaining a level of minimum competency will fail the test. Altering the content of the M.C.T. to accommodate an individual's inability to learn the tested material because of his handicap would be a "substantial modification," as well as a "perversion" of the diploma requirement. A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap. Thus denial of a diploma because of inability to pass the M.C.T. is not discrimination under the RHA.
>
> However, an otherwise qualified student who is unable to disclose the degree of learning he actually possesses because of the test format or environment would be the object of discrimination solely on the basis of his handicap. It is apparent . . . that "to discover a blind person's knowledge, a test must be given orally or in braille. . . ." . . . [RHA] requires administrative modification to minimize the effects of plaintiffs' handicaps on . . . examinations.

Brookhart illustrates well the meaning of "otherwise qualified" and of "reasonable accommodation." To exempt disabled students from the requirement of demonstrating the requisite level of knowledge before being awarded a diploma would negate the essential educational purpose of minimum competency testing. Conversely, to deny a disabled student the opportunity to demonstrate the requisite knowledge in a modified format, for example, by giving written or signed rather than oral test instructions to deaf students, is to discriminate on the basis of disability. Another court invoked the reasonable accommodation principle by saying that a school district had to permit a disabled student to bring her service dog to school.[21]

A recent case, *Bercovitch v. Baldwin School, Inc.*,[22] involved a severely disruptive sixth grade student at a private school. Having made numerous unsuccessful attempts to accommodate and modify the student's behavior, the school now sought, in effect, to expel the student. The child's parents claimed that the expulsion was impermissible under ADA because a psychologist had diagnosed the child as afflicted with ADHD. The parents argued that except for the behaviors arising out of his disability, the child was "otherwise qualified" to participate in the school's educational program and that the reasonable accommodation principle required extensive modification of the school's code of conduct as applied to the child. However, the First Circuit disagreed on both counts. The child was not otherwise qualified because he could not meet the school's behavioral requirements even with reasonable accommodations. The requested modification of the code of conduct amounted to a "significant alteration of a fundamental requirement of the school." ADA did not require "a school to suspend its normal codes of conduct in order to tolerate disruptive and disrespectful conduct when that behavior impaired the educational experience of other students and significantly taxed the resources of the faculty and other students."

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[20] 697 F.2d 179 (7th Cir. 1983).

[21] Sullivan v. Vallejo City United Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990).

[22] 133 F.3d 141 (1st Cir. 1998).

School districts are required to establish and publicize grievance procedures to deal with alleged violations of RHA. Individuals may also file a grievance against a school district with the Department of Education (ED) within 180 days of an allegedly discriminatory action. ED will investigate the allegation, and if a violation is found, the district must correct the violation or risk loss of all federal funds. Individuals can also sue for compensatory monetary damages for a violation of RHA[23] or ADA but probably not for punitive damages.[24] A successful complainant can also be awarded attorney's fees under either law. ADA also prohibits retaliation, interference, coercion, or intimidation against individuals claiming rights under the law, assisting in investigating violations, or testifying in proceedings brought under the law.

7.3 THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Congress enacted the first version of the IDEA[25] with the RHA already in force to further define the obligations of schools to disabled children and to help meet part of the cost of educating them. IDEA is a grant program providing money to states that choose to participate—all states now do—to help support the education of disabled children, ages three to twenty-one. To be eligible for federal funds under the IDEA, a state must develop a plan for providing all disabled children a "free, appropriate public education which emphasizes special education and related services designed to meet their unique needs." The plan must include a system for allocating funding to local school districts and comply with the program requirements as spelled out in the law and implementing regulations. In turn, each local school district must submit an application to the state indicating how it will comply with IDEA requirements.

The basic mandate of the IDEA is that all disabled children must receive a free appropriate public education (FAPE). FAPE means "special education and related services that are provided at public expense, under public supervision and direction without charge and are provided in conformity with the child's individual education plan (IEP)." The FAPE requirement extends to disabled children who have chosen to attend public schools, religious or other private schools, charter schools, or home schools and even to disabled children who have been suspended or expelled from school. IDEA is primarily a children's rights law: Disabled children must receive a free appropriate education whether or not their parents want them to. IDEA also gives parents the right to participate in the making of decisions regarding their disabled children and to examine all records concerning their disabled children.

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[23] Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994).

[24] Moreno v. Consolidated R.R. Corp., 99 F.3d 782 (6th Cir. 1996).

[25] 20 U.S.C. §§1400–1485; except as otherwise noted, discussion of IDEA is based on statute and IDEA regulations, Volume 34 C.F.R.

IDENTIFICATION, EVALUATION, AND CLASSIFICATION

IDEA defines "child with disability" as one who meets two conditions: "(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, . . . (ii) who, by reason thereof needs special education and related services." IDEA also permits school districts to service students ages three to nine who are experiencing physical, cognitive, communicative, social, emotional, or adaptive developmental delays and who by reason thereof need special education and related services. The statute provides an extended definition of specific learning disability, and the implementing regulations provide additional definitions of mental retardation, other health impaired, autism, and traumatic brain injury.

IDEA requires state and local education agencies to locate, identify, and evaluate disabled students, even those who have never enrolled in public school. The evaluation should be completed early enough so that an IEP can be in place by the beginning of the school year. If a possibly or apparently disabled child is applying for initial admission to a public school, the child—with parental consent—will usually be placed in the regular public school program until the evaluation is complete. Before a child is evaluated, written notice explaining the proposed evaluation and the reasons for it must be given to the child's parent. The notice must be in the parent's native language or, if the parent does not have a written language, it must be communicated orally. Parents must also be given a copy of their procedural safeguards, such as their right to request a hearing if they disagree with the results of the evaluation. Parents also have a right to examine "all records relating to" the child.

The school district must solicit parental consent for the evaluation. If the parents refuse consent, the parents may agree to enter into mediation with the district or the district may request an impartial hearing in order to proceed with the evaluation. Either the district or the parents may request review of the hearing officer's decision by the state's education agency and ultimately by a court. Similar procedures apply if parents initiate a request for an evaluation but the school district refuses. The district must provide the parents with written notice of the basis of their decision not to evaluate. Parents may then request mediation or a hearing followed by state-agency and judicial review.

The evaluation must be in the child's native language, free of racial bias, conducted by a multidisciplinary team, and designed to assess a wide range of skills including sensory, manual, and verbal. Only validated tests tailored to assess specific areas of educational need may be used. No general IQ test nor any "single procedure is to be the sole criterion for determining an appropriate educational program." An additional set of requirements establishes the criteria for determining the existence of a specific learning disability.

Overall, the evaluation must be designed to assess the child's strengths as well as weaknesses. At the conclusion of the evaluation, "a team of qualified professionals and the parent of the child" are to determine if the child is disabled. The team may not decide that the child is disabled "if the determinant factor . . . is lack of instruction in reading or math or limited English proficiency." Reevaluation of any child found to be disabled must take place at least every three years or more frequently if requested by the child's parents. Parents also have a right to obtain an independent educational evaluation. The school district must reimburse the parents for the independent evaluation if an impartial hearing finds the school's evaluation was incorrect.

Despite all the procedures and safeguards, schools and parents may disagree as to whether a child should be classified as disabled under the IDEA criteria. *Yankton School District v. Schramm*[26] concerned a high school student, Tracy, with cerebral palsy. Until she reached high school, Tracy had been classified as disabled and eligible for IDEA services. Tracy's last IEP, written for her ninth grade year, specified "adaptive physical education" as Tracy's only "special education." The rest of her program consisted of participation in regular coursework with nondisabled peers. Because Tracy was succeeding in all her regular coursework and no additional physical education was required for graduation, the district reasoned that Tracy was no longer in need of special education and therefore no longer disabled within the meaning of IDEA. This meant that she was not eligible for the transitional services mandated by the IDEA to prepare disabled students for life after high school.

However, the hearing officer, the district court, and ultimately, the Eighth Circuit Court of Appeals all disagreed. The court pointed out that although it was true that Tracy's last IEP specified adaptive physical education as her only "special education," it was not true that this was the only service she had been receiving because of her disability. The school had also provided her with shortened writing assignments, assistance in passing from class to class, and a variety of other accommodations that the court characterized as special education and related services. Thus, the district's own actions indicated that Tracy was disabled within the meaning of the IDEA.

Even when they agree that a child is disabled, schools and parents may disagree as to the proper classification of the disability. In *Gregory K. v. Longview School District*,[27] the school's evaluation concluded that Gregory was mildly mentally retarded, but his parents argued that he was learning disabled. To support their view, the parents presented an independent evaluation by a psychologist indicating that Gregory suffered from dyslexia. To settle the issue, the court turned to the definitions in the IDEA regulations for the terms "specific learning disabilities" and "mental retardation." The court noted that one of the necessary criteria for classification as learning disabled was "near average, average or above average intellectual ability."

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[26] 93 F.3d 1369 (8th Cir. 1996).

[27] 811 F.2d 1307 (9th Cir. 1987).

Then, looking at the results of various IQ tests, the court concluded that Gregory's intellectual functioning was too low to meet the definition of learning disabled. Therefore, the school district's classification of Gregory as mentally retarded was correct.

THE INDIVIDUALIZED EDUCATIONAL PROGRAM

Once it has been determined that a child qualifies for services under IDEA, an IEP must be developed. The process used to develop the IEP must consist of one or more meetings attended by the child's teacher, another public school representative qualified to supervise the provision of special education, the child's parents, and, where appropriate, the child. The district must take all necessary steps to ensure that the parents are able to attend the IEP meetings and understand the evaluation results, the proposed IEP, and anything else discussed at the meetings. If the child has been evaluated for the first time, a member of the evaluation team or someone else familiar with procedures and results of the evaluation must also be present. If a public school has placed or proposes to place a child in a private school or facility, a representative of the private facility must also attend. In developing the IEP, the team must consider any special circumstances that may be affecting the child's educational performance such as behavioral problems or limited English proficiency. The IEP must be reviewed by the same process at least once a year and early enough so that the new IEP can be in force at the beginning of the next school year. The review should specifically address any lack of expected progress. If parents are dissatisfied with the outcome of the IEP process, they may seek review from an impartial hearing officer, designated state agency, and ultimately from a court.

An IEP is a written statement that includes the child's present level of educational performance; annual goals and short-term instructional objectives; the special education and related services to be provided; any assistive technology to be provided; the extent to which the student will participate in the school's general program with nondisabled students; the dates for initiation and duration of services; criteria, procedures, and schedules for evaluating whether the objectives are being achieved; and a plan for informing the parents of the child's progress. IDEA regulations define special education as "specially designed instruction" to meet the unique needs of a disabled child including adapting "content, methodology or delivery of instruction."

Special education must include the same range of courses offered to nondisabled students including art, music, homemaking, vocational education, and physical education as well as extracurricular activities and nonacademic activities and services, such as lunch and recess as appropriate. Related services may include transportation, special equipment such as hearing aids and computers, and a variety of other forms of assistance necessary to make it possible for the child to benefit from special education. The IEP may also include behavioral interventions if necessary, and beginning no later than age fourteen, transition services. Behavioral interventions are programs designed to deal with conduct that impedes the child's learning or that of others. Transition services are programs designed to ease movement from school to postschool activities including work, higher education, and vocational training.

PROVIDING AN "APPROPRIATE" EDUCATION

A disabled child's IEP must specify a program of special education consistent with the child's evaluation. The program must meet the basic IDEA requirement of providing a Free Appropriate Public Education. The program must be consistent with a myriad of applicable federal and state regulations that implement and supplement the IDEA. Yet, even with all these requirements and guidelines, the issue of what constitutes an appropriate education for a particular disabled child is often difficult to resolve. Not surprisingly, given the realities of educational budgets, the imprecision of instructional methodologies, and the strong emotions involved, the program requested by parents sometimes does not coincide with the one offered by the school. In these instances, IDEA and the implementing regulations do not always provide a clear solution. Courts may be called upon to resolve the issue of whether a particular program or service is required under the IDEA or of whether a child's overall program of special education satisfies the law. The Supreme Court provided a framework for deciding these issues in the following case.

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BOARD OF EDUCATION OF HENDRICK HUDSON CENTRAL SCHOOL DISTRICT v. ROWLEY

Supreme Court of the United States, 1982

458 U.S. 176

Justice Rehnquist delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act. We agree and reverse the judgment of the Court of Appeals. . . .

II.

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N.Y. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrator's determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" as guaranteed by the Act.

The District Court found that Amy "is a remarkably well-adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," but "that she understands considerably less of what goes on in class than she could if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap." This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children. According to the District Court, such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." The District Court's definition arose from its assumption that the responsibility for "giv[ing] content to the requirement of an 'appropriate education' " had "been left entirely to the [federal] courts and the hearing officers."

A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals "agree[d] with the [D]istrict [C]ourt's conclusions of law," and held that its "findings of fact [were] not clearly erroneous."

We granted certiorari to review the lower courts' interpretation of the Act. Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. §1415? We consider these questions separately.

III.

A.

This is the first case in which this Court has been called upon to interpret any provision of the Act. . . .

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":

> The term "free appropriate public education" means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. §1401(18) (emphasis added).

"Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education."

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act. . . .

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children." That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutory definition of "free appropriate public education" to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history. . . .

B.

[F]ederal support for education of the handicapped is a fairly recent development. Before passage of the Act some States had passed laws to improve the educational services afforded handicapped children, but many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers. As previously noted, the House Report begins by emphasizing this exclusion and misplacement, noting that millions of handicapped children "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.' " One of the Act's two principal sponsors in the Senate urged its passage in similar terms:

> While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. The most recent statistics provided by the Bureau of Education for the Handicapped estimate that . . . 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education. (Remarks of Sen. Williams).

This concern, stressed repeatedly throughout the legislative history, confirms the impression conveyed by the language of the statute: By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside. . . .

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." Respondents and the United States correctly note that Congress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services. . . .

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.*

The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that "mainstreaming" preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.**

C.

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

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*This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. . . .

The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children. But at the same time, the goal of achieving some degree of self-sufficiency in most cases is a good deal more modest than the potential-maximizing goal adopted by the lower courts.

Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive standard which Congress imposed upon the States. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, "self-sufficiency" as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

**We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.

IV.

A.

. . . [T]he Act permits "[a]ny party aggrieved by the findings and decision" of the state administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." §1415(e)(2). The complaint, and therefore the civil action, may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." In reviewing the complaint, the Act provides that a court "shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." . . .

[The] court's inquiry in suits brought under § 1415(c)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

B.

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories . . .

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V.

Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, and in the formulation of the child's individual educational program. . . .

VI.

Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court, found that the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. . . .

[Blackmun filed a concurring opinion. White filed a dissenting opinion, joined by Brennan and Marshall.]

* * *

Rowley provides a basis for deciding many disputes over what constitutes an appropriate education. *Rowley* makes it clear that IDEA does not require that disabled students be provided with all services that might benefit them or with any and all services that their parents might request. Subsequent cases have interpreted *Rowley* to mean that a disabled child's program is appropriate if the program confers a meaningful benefit or if the child receives more than barely minimal benefits from the program.[28] The school district bears the burden of showing that its program is beneficial. The Third Circuit has said that a program confers the required meaningful benefit if the program is likely to produce some educational progress, not "regression or trivial . . . advancement."[29] The Third Circuit has also said that a child's "untapped potential" may be one factor in assessing whether an appropriate education is being provided.[30] In *Rowley*, the Supreme Court viewed Amy Rowley's record of academic achievement as evidence of meaningful benefit. In other cases, courts may rely on the testimony of teachers and other professionals to determine whether educational progress is occurring.[31] It is possible that the 1997 changes to the IDEA may lead to a reconsideration of the principles discussed in this paragraph because the new version of IDEA places a greater emphasis on precise and measurable goals than did earlier versions.

Defining appropriate education as the provision of a meaningful opportunity to benefit raises the question of whether there are disabled children for whom no appropriate education is possible. Are there children who are so seriously disabled that no educational program is likely to benefit them? If so, does the IDEA permit schools to decline to provide services to these children? The First Circuit considered these issues in *Timothy W. v. Rochester School District*.[32] A lower court had ruled that Timothy, a "severely retarded and multiply handicapped child," was not eligible for services under the IDEA because he could not benefit from special education. Plaintiff's experts argued that despite the severity of his disability, Timothy might benefit from certain types of stimulation, therapy, and training and that under IDEA, the district was required to provide these services. Finding in favor of Timothy, the First Circuit stated its conclusions as follows:

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[28] Polk v. Central Susquehanna Indep. Unit 16, 853 F.2d 171 (3d Cir. 1988); Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2d Cir. 1997); Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

[29] Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986); *see also*, M.C. *ex rel.* J.C. v. Central Regional Sch., 81 F.3d 389 (3d Cir. 1996).

[30] M.C. *ex rel.* J.C. v. Central Regional Sch., 81 F.3d 389 (3d Cir. 1996).

[31] Cypress-Fairbanks Intermediate Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir. 1997).

[32] 875 F.2d 954 (1st Cir. 1989).

> The statutory language of the Act [IDEA], its legislative history, and the case law construing it, mandate that all handicapped children, regardless of the severity of their handicap, are entitled to a public education. The district court erred in requiring a benefit/eligibility test as a prerequisite to implicating the Act. School districts cannot avoid the provisions of the Act by returning to the practices that were widespread prior to the Act's passage, and which indeed were the impetus for the Act's passage, of unilaterally excluding certain handicapped children from a public education on the ground that they are uneducable.
>
> The law explicitly recognizes that education for the severely handicapped is to be broadly defined, to include not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs. The only question for the school district to determine in conjunction with the child's parents, is what constitutes an appropriate individualized education program (IEP) for the handicapped child. We emphasize that the phrase "appropriate individualized education program" cannot be interpreted, as the school district has done, to mean "no educational program." . . .

Thus the IDEA does not recognize the existence of children who are too severely disabled to benefit from some form of education broadly defined.

In *Rowley*, the Court permitted the school to avoid incurring an expense that would have provided additional educational benefit because the program the district did provide met the requirements of the law. Other cases have cited *Rowley* in refusing to order services that promised no additional educational benefit.[33] In general, it is permissible for a school to choose a less costly program over a more costly program promising greater benefit as long as the less costly program meets the *Rowley* standard.[34] However, districts may be required to provide very costly services such as residential placement or a fulltime specialized tutor if the services are necessary to provide the student with a meaningful opportunity for educational benefit.[35] Thus, the Supreme Court recently ruled in *Cedar Rapids Community School District v. Garret F.* that a school must provide fulltime "one-on-one nursing services" to a quadriplegic student because without the services the student could not attend school. The Court rejected the school's claim that the law did not require the provision of such an expensive service.[36]

RELATED SERVICES

The main issue in the *Garret F.* case was whether the requested nursing service was a related service within the meaning of IDEA. IDEA defines related services to include:

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[33] Rettig v. Kent City Sch. Dist., 788 F.2d 328 (6th Cir. 1986); Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606 (E.D. Pa. 1991).

[34] Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984).

[35] Johnson v. Independent Sch. Dist. No. 4, 921 F.2d 1022 (10th Cir. 1990).

[36] 119 S. Ct. 992 (1999).

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Related services may include assistive technology devices and assistive technology services. The regulations define an **assistive technology device** as a piece of equipment or product used "to increase, maintain, or improve functional capabilities of [children] with disabilities," for example, a hearing aid or computer. An **assistive technology service** is a service that assists a child in the selection, acquisition, or use of an assistive technology, such as training a disabled child in the use of a computer. Related services is a very broad concept encompassing almost anything necessary to make it possible for a disabled child to benefit from special education.

The Supreme Court provided the framework for deciding cases like *Garret F.* in *Irving Independent School District v. Tatro*.[37] The issue was whether a school was required to provide a student with clean intermittent catheterization (CIC), "a procedure involving the insertion of a catheter into the urethra to drain the bladder." In order to decide the case, the Court offered three guidelines for determining whether a school is obligated to provide "services that relate to both the health and education needs of handicapped students." First, such services must be provided only to children who require special education. Second, services must be provided only if they are necessary to permit the child to benefit from special education. Thus, "if a particular medication or treatment may be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it." Third, services must be provided only if they may be performed by a nurse or other qualified person but are not required if they must be performed by a doctor. Even services that require a doctor's prescription or order must be provided if the doctor's actual presence is not necessary and the other guidelines are met. Applying these guidelines to *Tatro*, the Court determined that the school was obligated to provide CIC. The student required special education, could not attend school without the service, and CIC could be performed by a nurse or trained layperson.

The same reasoning led to the conclusion that the very expensive nursing services requested in *Garret F.* were also required by the IDEA. That Garret needed continuous monitoring and frequent interventions by a person with a significant level of medical training and skill did not release the district from its obligation to provide the services necessary to allow Garret to benefit from school. However, supportive medical services that require a doctor's presence because they are beyond the capabilities of a trained nurse need not be provided.[38] IDEA regulations do require that medical services for diagnosis and evaluation be provided even though they require a licensed physician if the services are necessary "to determine a child's medically related disability that results in the child's need for special education . . ." The courts have split on the issue of whether psychotherapy is an excluded medical service or a supportive psychological service.[39]

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[37] 468 U.S. 883 (1984).

[38] Detsel v. Board of Educ., 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd*, 820 F.2d 587 (2d Cir. 1987) (per curiam).

Like any related service, transportation must only be provided if and to the extent that it is necessary to permit a disabled child to benefit from education.[40] In one case, a deaf child capable of using the same transportation services as nondisabled children was denied publicly supported transportation to a private school.[41] However, in another case, transportation was a required related service for a child who needed suctioning of his tracheostomy tube and repositioning of his wheelchair during transit.[42] Another court required the district to transport a disabled student between the public school where she received some special education services and her parochial school and ruled that the requirement did not violate the Establishment Clause of the First Amendment.[43]

LEAST RESTRICTIVE ENVIRONMENT AND THE ISSUE OF PLACEMENT

IDEA demands that the FAPE offered to a disabled child meet the requirement of least restrictive environment (LRE), also known as **mainstreaming**: "[T]o the maximum extent appropriate" the child must be educated with children who are not disabled and special classes and schools and institutionalization should be used only "when the nature or severity of the [disability] is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The child must be placed "as close as possible" to home. In order to meet these requirements, school districts must maintain a continuum of possible alternative placements including general education classrooms, special classes, resource rooms, special schools, home instruction, and institutionalization.

In recent years, some schools have adopted a policy of "inclusion" or "full inclusion" meaning that all or most disabled children are educated in regular education classrooms all or most of the time. IDEA does not mandate inclusion and in fact requires special placement if the regular classroom cannot provide an appropriate education. The 1997 IDEA amendments require that the IEP include an "explanation of the extent, if any, to which the child will not participate with nondisabled students in the regular class. . . ." This requirement is likely to further promote the inclusion of disabled students in regular classrooms.

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[39] *See* Max M. v. Thompson, 592 F. Supp. 1450 (1984) (supportive psychological service); McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983) (excluded medical service).

[40] *See*, Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986).

[41] McNair v. Oak Hills Local Sch. Dist., 872 F.2d 153 (6th Cir. 1989).

[42] Macomb County Intermediate Sch. Dist. v. Joshua S., 715 F. Supp. 824 (E.D. Mich. 1989).

[43] Felter v. Cape Girardeau Pub. Sch. Dist., 810 F. Supp. 1062 (E.D. Mo. 1993).

Disputes between parents and schools over the issue of LRE are common. Sometimes the school advocates special placement while parents favor education in the regular classroom and sometimes the positions are reversed. The LRE requirement creates a presumption in favor of the regular classroom. The presumption can be rebutted by a showing that education in the regular classroom offers no meaningful educational benefit for a particular disabled student or that a student with disabilities is so disruptive that the education of other students would be significantly impaired. More controversial are cases in which both approaches offer educational benefit but one approach offers significantly greater benefits or when one approach offers greater benefit but at significantly greater cost. Another common problem is how to balance the potentially greater academic benefits of out-of-class placement with the potentially greater social benefits of mainstreaming. The following case considers these issues.

DANIEL R.R. v. STATE BOARD OF EDUCATION

United States Court of Appeals for the Fifth Circuit, 1989
874 F.2d 1036

Gee, Circuit Judge:

Plaintiffs in this action, a handicapped boy and his parents, urge that a local school district failed to comply with the Education of the Handicapped Act. Specifically, they maintain that a school district's refusal to place the child in a class with nonhandicapped students violates the Act. The district court disagreed and, after a careful review of the record, we affirm the district court.

I. BACKGROUND

A. General

. . . Educating a handicapped child in a regular education classroom with nonhandicapped children is familiarly known as "mainstreaming," and the mainstreaming requirement is the source of the controversy between the parties before us today.

B. Particular

Daniel R. is a six year old boy who was enrolled, at the time this case arose, in the El Paso Independent School District (EPISD). A victim of Downs Syndrome, Daniel is mentally retarded and speech impaired. By September 1987, Daniel's developmental age was between two and three years and his communication skills were slightly less than those of a two year old.

In 1985, Daniel's parents Mr. and Mrs. R., enrolled him in EPISD's Early Childhood Program, a half-day program devoted entirely to special education. Daniel completed one academic year in the Early Childhood Program. Before the 1986–87 school year began, Mrs. R. requested a new placement that would provide association with nonhandicapped children. Mrs. R. wanted EPISD to place Daniel in Pre-kindergarten—a half-day, regular education class. Mrs. R. conferred with Joan Norton, the Pre-Kindergarten instructor, proposing that Daniel attend the half-day Pre-kindergarten class in addition to the half-day Early Childhood class. As a result, EPISD's Admission, Review and Dismissal (ARD) Committee met and designated the combined regular and special education program as Daniel's placement.

This soon proved unwise, and not long into the school year Mrs. Norton began to have reservations about Daniel's presence in her class. Daniel did not participate without constant, individual attention from the teacher or her aide, and failed to master any of the skills Mrs. Norton was trying to teach her students. Modifying the Pre-kindergarten curriculum and her teaching methods sufficiently to reach Daniel would have required Mrs. Norton to modify the curriculum almost beyond recognition.

In November 1986, the ARD Committee met again, concluded that Pre-kindergarten was inappropriate for Daniel, and decided to change Daniel's placement. Under the new placement, Daniel would attend only the special education, Early Childhood class; would eat lunch in the school cafeteria, with nonhandicapped children, three days a week if his mother was present to supervise him; and would have contact with nonhandicapped students during recess. Believing that the ARD had improperly shut the door to regular education for Daniel, Mr. and Mrs. R. exercised their right to a review of the ARD Committee's decision.

As the EHA requires, Mr. and Mrs. R. appealed to a hearing officer who upheld the ARD Committee's decision. After a hearing which consumed five days of testimony and produced over 2500 pages of transcript, the hearing officer concluded that Daniel could not participate in the Pre-kindergarten class without constant attention from the instructor because the curriculum was beyond his abilities. In addition, the hearing officer found, Daniel was receiving little educational benefit from Pre-kindergarten and was disrupting the class—not in the ordinary sense of the term, but in the sense that his needs absorbed most of the teacher's time and diverted too much of her attention away from the rest of the class. Finally, the instructor would have to downgrade 90 to 100 percent of the Pre-kindergarten curriculum to bring it to a level that Daniel could master. Thus, the hearing officer concluded, the regular education, Pre-kindergarten class was not the appropriate placement for Daniel.

Dissatisfied with the hearing officer's decision, Mr. and Mrs. R. proceeded to the next level of review by filing this action in the district court. Although the EHA permits the parties to supplement the administrative record, Daniel's representatives declined to do so; and the court conducted its de novo review on the basis of the administrative record alone. The district court decided the case on cross motions for summary judgment. Relying primarily on Daniel's inability to receive an educational benefit in regular education, the district court affirmed the hearing officer's decision. . . .

IV. SUBSTANTIVE VIOLATIONS

A. Mainstreaming under the EHA

The cornerstone of the EHA is the "free appropriate public education." . . . The Act defines a free appropriate public education in broad, general terms without dictating substantive educational policy or mandating specific educational methods.

In contrast to the EHA's vague mandate for a free appropriate public education lies one very specific directive prescribing the educational environment for handicapped children. Each state must establish

> procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special education, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

With this provision, Congress created a strong preference in favor of mainstreaming.

By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act. School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs. Regular classes, however, will not provide an education that accounts for each child's particular needs in every case. The nature or severity of some children's handicaps is such that only special education can address their needs. For these children, mainstreaming does not provide an education designed to meet their unique needs and, thus, does not provide a free appropriate public education. As a result, we cannot evaluate in the abstract whether a challenged placement meets the EHA's mainstreaming requirement. "Rather, that laudable policy objective must be weighed in tandem with the Act's principal goal of ensuring that the public schools provide handicapped children with a free appropriate public education."

Although Congress preferred education in the regular education environment, it also recognized that regular education is not a suitable setting for educating many handicapped children. Thus, the EHA allows school officials to remove a handicapped child from regular education or to provide special education if they cannot educate the child satisfactorily in the regular classroom. Even when school officials can mainstream the child, they need not provide for an exclusively mainstreamed environment; the Act requires school officials to mainstream each child only to the maximum extent appropriate. In short, the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education. The Act does not, however, provide any substantive standards for striking the proper balance between its requirement for mainstreaming and its mandate for a free appropriate public education.

B. Determining Compliance with the Mainstreaming Requirement

Although we have not yet developed a standard for evaluating mainstreaming questions, we decline to adopt the approach that other circuits have taken. In *Roncker*, visiting the same question which we address today, the Sixth Circuit devised its own test to determine when and to what extent a handicapped child must be mainstreamed. According to the *Roncker* [*v. Walter*, 700 F.2d 1058 (6th Cir. 1983)] court,

> [t]he proper inquiry is whether a proposed placement is appropriate under the Act. . . . In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.

We respectfully decline to follow the Sixth Circuit's analysis. Certainly, the Roncker test accounts for factors that are important in any mainstreaming case. We believe, however, that the test necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service feasibly can be provided in a regular or special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make. Moreover, the test makes little reference to the language of the EHA. Yet, as we shall see, we believe that the language of the Act itself provides a workable test for determining whether a state has complied with the Act's mainstreaming requirement. . . .

Ultimately, our task is to balance competing requirements of the EHA's dual mandate: a free appropriate public education that is provided, to the maximum extent appropriate, in the regular education classroom. As we begin our task we must keep in mind that Congress left the choice of educational policies and methods where it properly belongs—in the hands of state and local school officials. Our task is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local school officials have complied with the Act. Adhering to the language of the EHA, we discern a two part test for determining compliance with the mainstreaming requirement. First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate. A variety of factors will inform each stage of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

In this case, several factors assist the first stage of our inquiry, whether EPISD can achieve education in the regular classroom satisfactorily. At the outset, we must examine whether the state has taken steps to accommodate the handicapped child in regular education. The Act requires states to provide supplementary aids and services and to modify the regular education program when they mainstream handicapped children. If the state has made no effort to take such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education. If the state is providing supplementary aids and services and is modifying its regular education program, we must examine whether its efforts are sufficient. The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad. . . .

Although broad, the requirement is not limitless. States need not provide every conceivable supplementary aid or service to assist the child. Furthermore, the Act does not require regular education instructors to devote all or most of their time to one handicapped child or to modify the regular education program beyond recognition. If a regular education instructor must devote all of her time to one handicapped child, she will be acting as a special education teacher in a regular education classroom. Moreover, she will be focusing her attentions on one child to the detriment of her entire class, including, perhaps, other, equally deserving, handicapped children who also may require extra attention. Likewise, mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student.

Next, we examine whether the child will receive an educational benefit from regular education. This inquiry necessarily will focus on the student's ability to grasp the essential elements of the regular education curriculum. Thus, we must pay close attention to the nature and severity of the child's handicap as well as to the curriculum and goals of the regular education class. For example, if the goal of a particular program is enhancing the child's development, as opposed to teaching him specific subjects such as reading or mathematics, our inquiry must focus on the child's ability to benefit from the developmental lessons, not exclusively on his potential for learning to read. We reiterate, however, that academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself. Thus, our inquiry must extend beyond the educational benefits that the child may receive in regular education.

We also must examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child. For example, a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide for him. In such a case, the benefit that the child receives from mainstreaming may tip the balance in favor of mainstreaming, even if the child cannot flourish academically. On the other hand, placing a child in regular education may be detrimental to the child. In such a case, mainstreaming would not provide an education that is attuned to the child's unique needs and would not be required under the Act. Indeed, mainstreaming a child who will suffer from the experience would violate the Act's mandate for a free appropriate public education.

Finally, we ask what effect the handicapped child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving. A handicapped child's placement in regular education may prove troublesome for two reasons. First, the handicapped child may, as a result of his handicap, engage in disruptive behavior. "[W]here a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs." Second, the child may require so much of the instructors' attention that the instructor will have to ignore the other students' needs in order to tend to the handicapped child. The Act and its regulations mandate that the school provide supplementary aids and services in the regular education classroom. A teaching assistant or an aide may minimize the burden on the teacher. If, however, the handicapped child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education.

If we determine that education in the regular classroom cannot be achieved satisfactorily, we next ask whether the child has been mainstreamed to the maximum extent appropriate. The EHA and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to nonhandicapped students, they have fulfilled their obligation under the EHA.

C. EPISD's Compliance with the Mainstreaming Requirement

After a careful review of the voluminous administrative record, we must agree with the trial court that EPISD's decision to remove Daniel from regular education does not run afoul of the EHA's preference for mainstreaming. Accounting for all of the factors we have identified today, we find that EPISD cannot educate Daniel satisfactorily in the regular education classroom. Furthermore, EPISD has taken creative steps to provide Daniel as much access to nonhandicapped students as it can, while providing him an education that is tailored to his unique needs. Thus, EPISD has mainstreamed Daniel to the maximum extent appropriate.

EPISD cannot educate Daniel satisfactorily in the regular education classroom; each of the factors we identified today counsels against placing Daniel in regular education. First, EPISD took steps to modify the Pre-kindergarten program and to provide supplementary aids and services for Daniel—all of which constitute a sufficient effort. Daniel contends that EPISD took no such steps and that, as a result, we can never know whether Daniel could have been educated in a regular classroom. Daniel's assertion is not supported by the record. The Pre-kindergarten teacher made genuine and creative efforts to reach Daniel, devoting a substantial—indeed, a disproportionate—amount of her time to him and modifying the class curriculum to meet his abilities. Unfortunately, Daniel's needs commanded most of the Pre-kindergarten instructor's time and diverted much of her attention away from the rest of her students. Furthermore, the instructor's efforts to modify the Pre-kindergarten curriculum produced few benefits to Daniel. Indeed, she would have to alter 90 to 100 percent of the curriculum to tailor it to Daniel's abilities. Such an effort would modify the curriculum beyond recognition, an effort which we will not require in the name of mainstreaming.

Second, Daniel receives little, if any, educational benefit in Pre-kindergarten. Dr. Bonnie Fairall, EPISD's Director of Special Education, testified that the Pre-kindergarten curriculum is "developmental in nature; communication skills, gross motor [skills]" and the like. The curriculum in Kindergarten and other grades is an academic program; the developmental skills taught in Pre-kindergarten are essential to success in the academic classes. Daniel's handicap has slowed his development so that he is not yet ready to learn the developmental skills offered in Pre-kindergarten. Daniel does not participate in class activities; he cannot master most or all of the lessons taught in the class. Very simply, Pre-kindergarten offers Daniel nothing but an opportunity to associate with nonhandicapped students.

Third, Daniel's overall educational experience has not been entirely beneficial. As we explained, Daniel can grasp little of the Pre-kindergarten curriculum; the only value of regular education for Daniel is the interaction which he has with nonhandicapped students. Daniel asserts that the opportunity for interaction, alone, is a sufficient ground for mainstreaming him. When we balance the benefits of regular education against those of special education, we cannot agree that the opportunity for Daniel to interact with nonhandicapped students is a sufficient ground for mainstreaming him. Regular education not only offers Daniel little in the way of academic or other benefits, it also may be harming him. When Daniel was placed in Pre-kindergarten, he attended school for a full day; both Pre-kindergarten and Early Childhood were half-day classes. The experts who testified before the hearing officer indicated that the full day program is too strenuous for a child with Daniel's condition. Simply put, Daniel is exhausted and, as a result, he sometimes falls asleep at school. Moreover, the record indicates that the stress of regular education may be causing Daniel to develop a stutter. Special education, on the other hand, is an educational environment in which Daniel is making progress. Balancing the benefits of a program that is only marginally beneficial and is somewhat detrimental against the benefits of a program that is clearly beneficial, we must agree that the beneficial program provides the more appropriate placement.

Finally, we agree that Daniel's presence in regular Pre-kindergarten is unfair to the rest of the class. When Daniel is in the Pre-kindergarten classroom, the instructor must devote all or most of her time to Daniel. Yet she has a classroom filled with other, equally deserving students who need her attention. Although regular education instructors must devote extra attention to their handicapped students, we will not require them to do so at the expense of their entire class.

Alone, each of the factors that we have reviewed suggests that EPISD cannot educate Daniel satisfactorily in the regular education classroom. Together, they clearly tip the balance in favor of placing Daniel in special education. Thus, we turn to the next phase of our inquiry and conclude that EPISD has mainstreamed Daniel to the maximum extent appropriate. Finding that a placement that allocates Daniel's time equally between regular and special education is not appropriate, EPISD has taken the intermediate step of mainstreaming Daniel for lunch and recess. This opportunity for association with nonhandicapped students is not as extensive as Daniel's parents would like. It is, however, an appropriate step that may help to prepare Daniel for regular education in the future. As education in the regular classroom, with the use of supplementary aids and services cannot be achieved satisfactorily, and as EPISD has placed Daniel with nonhandicapped students to the maximum extent appropriate, we affirm the district court. . . .

* * *

Daniel R.R. explains the Fifth Circuit's interpretation of the LRE requirement. The Third and Eleventh Circuits have adopted related approaches to dealing with LRE disputes.[44] However, as noted in the opinion, other courts have offered different interpretations. The Sixth Circuit explained its approach in *Roncker v. Walter*.[45]

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities . . . because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could feasibly be provided in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.

The Ninth Circuit has adopted a balancing test encompassing four factors:

1. the educational benefits available in a general education classroom with supplementary aids and services as compared to the benefits available in a more restrictive environment;
2. the nonacademic benefits of the general classroom compared to the more restrictive environment;
3. the effect of the disabled student's presence on the teacher and other students in the general classroom; and
4. the cost of placement in the general education classroom (which may be either higher or lower than the more restrictive placement).

The district bears the burden of proving the appropriateness of its preferred placement in light of these four factors.[46] The Fourth Circuit has said that mainstreaming is not required when there are no educational benefits to be realized from placement in a general class, any marginal benefits from placement in a general class would be significantly outweighed by the benefits of a more restrictive placement, or the student would be too disruptive a force in the general class. The court noted that under IDEA, social benefits are subordinate to academic achievement.[47] All these approaches may have to be reconsidered in light of the 1997 IDEA, which arguably strengthens the presumption in favor of inclusion, but also places great emphasis on the achievement of academic goals.

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[44] Oberti v. Board of Educ. of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991), *opinion withdrawn and remanded*, 956 F.2d 1025 (11th Cir. 1992).

[45] 700 F.2d 1058 (6th Cir. 1983).

[46] Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

[47] Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 688 (1998).

RESIDENTIAL PLACEMENTS

Among the most controversial placement decisions are those that involve the question of whether or not to place a child in a residential facility. Residential placements are both the most restrictive and usually the most expensive option. Nevertheless IDEA regulations specify that "[i]f placement in a . . . residential program is necessary to provide special education and related services to a child with a disability, the program, including nonmedical care and room and board, must be at no cost to the parents of the child."[48] One court approached the issue of whether residential placement was required for a severely physically and mentally disabled child by asking whether "full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social, or emotional problems." If institutionalization was the only way a child could receive educational benefits, even if the placement was also needed to provide noneducational services, then the full cost of the residential placement had to be paid for by the state or local school district. Residential placement was ordered for the multihandicapped child because the child could not be educated without close full-time supervision.[49]

In cases of emotionally disturbed children requesting residential placement, the courts consider whether the placement is necessary to meet educational needs, whether the facility is a hospital or an accredited educational facility, whether the program provided is prescribed by physicians or educators, the intensity of the program, and the cost as compared to nonresidential educational programs.[50] Even when a major goal of residential placement is training in basic life skills, such as using a fork, getting dressed, and toileting, courts have required schools to pay for the placement unless an appropriate education could be provided in a nonresidential setting.[51] The issue, said the Third Circuit is whether "full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems." If the residential placement is "part and parcel of . . . specially designed instruction . . . to meet the unique needs of a handicapped child," the school must pay for it.[52]

The Sixth Circuit has said that cost may be considered only when comparing two options that both meet the *Rowley* standard, but not if a particular program or service is necessary to assure the child a free appropriate education. Thus in one case, the court ordered a residential placement costing $88,000 per year.[53] Even year round placements at public expense will be ordered if necessary to yield educational benefits.[54] However, IDEA does not require a state or local school district to pay for residential placements undertaken for wholly noneducational purposes, for example, placement of a comatose child in a hospital.[55] After a child has been placed in a residential facility, whether public or private, the child's home school district continues to be responsible for monitoring compliance with the IEP and for reevaluation.

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[48] *See, In re* Drew P. v. Clark County Sch. Dist., 877 F.2d 927 (11th Cir. 1989).

[49] Kruelle v. New Castle County Sch. Dist., 642 F.2d 687 (3d Cir. 1981).

[50] Taylor v. Honig, 910 F.2d 627 (9th Cir. 1990); Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990).

[51] Abrahamson v. Hershman, 701 F.2d 233 (1st Cir. 1983); Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980).

[52] Kruelle v. New Castle County Sch. Dist., 642 F.2d 687 (3d Cir. 1981).

[53] Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984).

[54] Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986); Helms v. Independent Sch. Dist. No. 3 of Broken Arrow, 750 F.2d 820 (10th Cir. 1984).

DISABLED STUDENTS AND PRIVATE SCHOOLS

If a private school student qualifies for services under IDEA, the public school district may at its option either make the appropriate special education available at public school or if permitted by state law, pay for the services in the private school. The services provided to disabled students in private schools must be comparable in quality to the services provided in the public school. If a school district makes a FAPE available to a disabled child in a public school but the child's parents elect to place the child in a private school, the district does not have to pay the child's tuition or for the special costs associated with the child's disability.[56] If, however, a private facility is necessary in order to provide an appropriate education for a disabled child, the district must pay the cost of the child's education. If parents place their disabled child in private school because they do not believe the public school's proposed placement is appropriate, and the parents' position is ultimately upheld by a hearing officer or court, the public school must reimburse the parents for the private school tuition and related costs such as transportation.[57]

The Supreme Court has ruled that the provision of a signer to a deaf student attending a parochial school does not violate the Establishment Clause.[58] Likewise, it is probably permissible for public schools to provide any related service specified by a disabled parochial student's IEP.[59] Nevertheless, it is doubtful whether it would be permissible for a public school district to pay a child's religious school tuition, even if the school was specially equipped to provide the child with an appropriate education. Public schools are responsible for monitoring and reevaluating disabled students placed in private schools.

CHANGE OF PLACEMENT AND DISCIPLINE OF DISABLED STUDENTS

The question of what constitutes a "change of placement" for a disabled student has been considered by a number of courts and several different definitions have resulted. The Second Circuit said that a change in placement occurs when there is a change in the "general educational program in which the child is enrolled, rather than mere variations in the program itself." Thus, in *Concerned Parents v. New York City Board of Education,*[60] the court ruled there was no change of placement when, after one school closed, the student was transferred to a similar but less innovative program. The Sixth Circuit said a change of placement occurs when a modified educational program "is not comparable to the plan set forth in the original IEP."[61] The Third Circuit said the question "has to be whether the decision is likely to affect in some significant way the child's learning experience." Thus the court said a change in how the child was transported to school was not a change in placement.[62]

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[55] Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985) (dictum); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983) (dictum).

[56] Cefalu v. East Baton Rouge Parish Sch. Bd., 117 F.3d 231 (5th Cir. 1997).

[57] Burlington Sch. Comm. of Burlington v. Department of Educ. of Mass., 471 U.S. 359 (1985).

[58] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[59] *See*, Agostini v. Felton, 521 U.S. 203 (1997).

However change of placement is defined, IDEA requires parental notification before a change of placement can occur. Parents who object to a proposed change of placement may agree to mediation or demand an impartial hearing and invoke the **stay-put** requirement. The stay-put requirement is designed to maintain the status quo during the impartial hearing and any subsequent appeals. Unless both the school and the parents agree, the child must be left in the present educational placement even if one party believes that it is not an "appropriate" placement under the law. Whether the present placement is appropriate is often the subject of the dispute under consideration. If either party wants to temporarily change the present placement before the appeal process is over, that party must go to court to effect the change.[63] The public school district must bear the cost of funding the present placement pending the outcome of the appeal process even if the present placement is in a private setting.[64]

Sometimes determining the present placement is not difficult. If the child is in a school or program because of an IEP, by an agreement between the parents and school, because of an order of a court, or if this was the placement of the child prior to the first IDEA evaluation and placement, this is the present placement. However, sometimes in the midst of a dispute with school officials, parents unilaterally move the child to a private school. The question then arises whether the private school placement is the present placement pending final resolution of the dispute. It may be if a court concludes that the parent had justification to make the unilateral shift—if, for example, the school delayed unduly in making an IEP proposal.[65] Also, if it is later determined that the public school placement was not appropriate, the parents are entitled to reimbursement of the cost of the private school. To be eligible for reimbursement, parents must notify the district in a timely manner of the private school placement and their reason for moving the child.

Sometimes a school wishes to modify a disabled child's program for disciplinary reasons. Discipline of disabled children raises many issues including whether various forms of discipline constitute a "change of placement," whether a child may be excluded from school for disciplinary reasons, what procedures must be followed in disciplining a disabled child, where the child is to "stay-put" pending disciplinary proceedings, and whether exceptions to the usual requirements may be made if a disruptive child is a threat to others.

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[60] 629 F.2d 751 (2d Cir. 1980).

[61] Tilton v. Jefferson County Bd. of Educ., 705 F.2d 800, 804 (6th Cir. 1983).

[62] DeLeon v. Susquehanna Community Sch. Dist., 747 F.2d 149 (3d Cir. 1984); *see also*, Weil v. Board of Elementary & Secondary Educ., 931 F.2d 1069 (5th Cir. 1991).

[63] Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983).

[64] Saleh v. District of Columbia, 660 F. Supp. 212 (D.D.C. 1987).

[65] Cochran v. District of Columbia, 660 F. Supp. 314 (D.D.C. 1987).

Because these issues created a great deal of controversy and litigation under previous versions of the IDEA,[66] one of the goals of the 1997 revisions of the IDEA was to clarify the rules concerning the discipline of disabled students. The new law attempts to strike a balance between the basic IDEA principle that all disabled students are entitled to a FAPE and the need for schools to maintain order and safety. The new rules apply both to disabled students with IEPs and to children not yet declared eligible for special education if the school district "had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." A school district is deemed to have knowledge of a child's disability if a parent (in writing) or a teacher has expressed concern to district officials that a child might be disabled, if a parent has requested an evaluation of a child for possible disability, or if the behavior or performance of a child demonstrates the possibility of a disability. If a district has no basis for knowing that a child is disabled or if a district has already conducted an evaluation and found the child not to be disabled, it may discipline the child in the same way as any other child. If an initial request for evaluation is made while the child is being disciplined, the evaluation must be conducted in an expedited manner with the child remaining in the placement determined by school authorities. If the evaluation finds the child to be disabled, the district may not discipline the child in a manner that deprives the child of a FAPE.

For children who already have an IEP or who the district knows to be disabled, any lawful form of discipline that is not a change of placement may be employed. These may include verbal reprimands, denial of privileges, and detentions of reasonable duration. Whether corporal punishment of disabled children may be employed in places where it is otherwise allowed is an unresolved issue. It is also permissible to relocate a misbehaving disabled child to what the law calls an "interim alternative educational setting" (IAES), presumably including a more restrictive placement or in-school suspension for ten days or less or to suspend a disabled student for ten days or less without employing change of placement procedures.

Removal of a child with a disability from the child's current educational placement is deemed a change of placement if the removal is for more than ten consecutive school days or the "child is subjected to a series of removals that constitute a pattern because they cumulate to more than ten school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another." If a school district wishes to discipline a disabled child in a manner that constitutes a change of placement, the IEP team must first undertake an inquiry to determine if the student's misbehavior was a "manifestation of the disability." The manifestation inquiry may be undertaken while the disabled child is being disciplined in a manner that does not constitute a change of placement such as a suspension of ten days or less. The IEP team's findings are subject to review by an impartial hearing officer at parental request. Misbehavior is a manifestation of a student's disability if the disability impairs the student's ability to understand the impact or consequences of the behavior or impairs the student's ability to control the behavior. Misbehavior may also be deemed a manifestation of a student's disability if the student's IEP was not being followed or was inappropriate.

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[66] *See*, for historical background, Honig v. Doe, 484 U.S. 305 (1988); Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 115 F.3d 1273 (7th Cir. 1997).

If the behavior was a manifestation of the disability, further disciplinary procedures involving relocation or exclusion from school require standard change of placement procedures including parental notification, IEP team deliberations, and possible impartial hearing and court review. If, however, a disabled child brings a weapon to school or possesses or sells illegal drugs at school, the IEP team may place the student in an IAES for up to forty-five days during the manifestation determination and change of placement procedures. An impartial hearing officer can also place a disabled student in an IAES if the school convinces the hearing officer that it is dangerous for the student to remain in the present placement. The IAES must permit the child to continue to participate in the general curriculum and to receive the services specified in the IEP. Within ten days of the IAES placement, the school must perform a "functional behavioral assessment" and develop a behavioral intervention plan as part of the student's IEP.

If a disabled student's misbehavior is found not to be a manifestation of the student's disability, the student may be subjected to the same disciplinary procedures, including long-term suspension, as nondisabled students. However, disabled students must always continue to receive a FAPE. This means that school districts must provide home tutors or other alternative arrangements that offer a meaningful opportunity for educational benefit to disabled students excluded from school for any reason. In-school suspensions must also provide a meaningful opportunity to benefit.

DISPUTE RESOLUTION UNDER IDEA

Any substantive or procedural dispute between parents and school over any aspect of the IDEA is subject to mediation if both sides agree to mediation. Mediation must be confidential, at no cost to the parents, and conducted by a knowledgeable individual chosen from a state-maintained list. If mediation is not desired or fails to produce an agreement, either side can request review, first by an impartial hearing officer, then by a designated state agency, and finally by a court. The law does not specify the level of expertise that the hearing officer must possess, but "impartial" means that the hearing officer must not be a regular employee of the district or directly involved in the care of the child. Parents may demand a hearing to insist that their child be evaluated, to protest the process or outcome of an evaluation or IEP meeting, to challenge the adequacy of special education, related services, or other aspects of the program provided, to object to changes of placement or disciplinary actions, or to claim that their procedural rights as parents have been violated. A school district may also initiate a hearing if the district believes that parents are preventing a disabled child from receiving an appropriate education and may also appeal an adverse decision by a hearing officer or state agency to the next level. Courts will generally not consider complaints that have not exhausted the administrative hearing process.

The issue of the burden of proof in disputes over whether a child's educational program is appropriate is not fully resolved. The IDEA itself does not state whether the school district must show that its proposed program is appropriate or the parents must show that it is not. The Supreme Court's *Rowley* decision assumed, but did not explicitly state, that the school district bore the burden of proving to the hearing officer that the district's program was "designed to provide educational benefit to the handicapped child." Most hearing officers place the burden of proof on the school; however, the situation changes when a case is appealed to a court. In *Rowley*, the Supreme Court warned that the federal courts lack expertise in the area of special education and therefore ought to give due weight to the decision of the experts. Courts have interpreted this comment to mean that the burden of proof is on the party who seeks to challenge an impartial hearing officer's ruling,[67] but a minority of courts have held that the burden of proof remains on the school district or, in placement disputes, on the party proposing the more restrictive environment.[68]

If parents prevail at an administrative hearing, the school district must take whatever action the hearing officer or state agency prescribes. Parents who prevail in a court case may be granted declaratory and injunctive relief—judicial orders to do what the law requires. Courts may also order remedial action such as an extended school year as a remedy for a school's failure to provide an appropriate education to a disabled child.[69] In addition, parents may be reimbursed for expenses incurred in providing necessary special education or related service.[70] Finally, parents who successfully sue a school district for violation of IDEA may be awarded reimbursement of their attorney's fees. Courts may also award attorney's fees to parents who succeed at an administrative hearing.[71]

7.4 BILINGUAL EDUCATION

Educators and policymakers must deal with a variety of interrelated issues to meet their educational and legal obligations to children who are non-

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[67] Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998); Clyde K. v. Puyallup Sch., 35 F.3d 1396 (9th Cir. 1994); Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990); Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988); Spielberg v. Henrico County Pub. Sch., 853 F.2d 256 (4th Cir. 1988).

[68] Oberti v. Board of Educ. of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993); Lascari v. Board of Educ. of Ramapo Indian Hills, 560 A.2d 1180 (N.J. 1989).

[69] Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988); Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986); *but see*, Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551 (9th Cir. 1987).

[70] Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984); Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988).

[71] Eggers v. Bullitt County Sch. Dist., 854 F. 2d 892 (6th Cir. 1988).

English proficient or limited-English proficient (LEP). Some of the issues are phrased in the language of equity, discrimination, and civil rights. Is it equitable to provide all children with an education in the primary language of the country in which they live? Conversely, is it equitable to teach students in a language they cannot understand? Is it a moral or legal responsibility of public schools to provide special English proficiency programs for LEP students? Is it fair to spend more money on students who don't speak English than on those who do?

A second group of issues is pedagogical. What is the most effective way to help LEP children become English proficient? Should or may English as a second language (ESL) programs be used? Under this approach students spend most of their day in regular classes but are pulled out to receive intensive instruction in English. Or might an immersion program work best? One type of immersion has students in classes where the bilingual teacher instructs in English but is capable of understanding students who ask questions in their mother tongue. The curriculum is organized in a way that does not presume the students are English proficient. Or is bilingual education the best method? Under this arrangement students are enrolled in subject matter classes taught in their own language and are provided with special instruction to learn English.

Bilingual education itself comes in several versions. Transitional bilingual programs employ subject-matter instruction in the child's language only until the child is capable of learning in all-English classes. Bilingual-bicultural maintenance programs continue instruction in the child's mother tongue even after attainment of English proficiency. They aim to help the children to develop fluency in both languages and to appreciate both their own and mainstream U.S. culture.

Finally, there are social and political questions: Is it in children's best interest to help them maintain proficiency in their mother tongue or does this tend to limit their prospects later in life? Should decisions like this be made by families, students themselves, or society as a whole? Do bilingual programs foster language divisions within the United States that can lead to political instability? Is the effort to promote English as the dominant language an expression of cultural and racial bias? Will we as a nation be better off if our citizens speak but one language or if they are multilingual? Should major policy decisions, such as how best to educate LEP children, be centralized or left to the states or local school districts?

Given the range and complexity and lack of consensus on these issues, it is not surprising that federal law and policy have been tumultuous and inconsistent. The first federal effort to address the civil rights of LEP students was based on Title VI of the Civil Rights Act of 1964.[72] In 1970, six years after the law was passed, the Office for Civil Rights (OCR) issued a memorandum interpreting Title VI's prohibition against discrimination on the basis of "national origin": "[W]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[73]

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[72] 42 U.S.C. § 2000(d).

OCR's interpretation did not require an intent to discriminate as a necessary element of a Title VI violation; rather a violation would be found wherever a school's language policy had the effect of excluding LEP students from effective participation in its program. Districts in violation of Title VI could lose all their federal funds.

In 1974, OCR's interpretation of Title VI was tested in the courts. The plaintiffs were Chinese LEP students who were not receiving any special assistance to learn English and were enrolled in all-English subject matter classes. The plaintiffs claimed that lack of special language assistance was both a form of racial discrimination in violation of the Equal Protection Clause and a violation of Title VI. The students lost in the lower courts on both claims. The Ninth Circuit wrote that "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system."[74] It simply was not the school district's fault if LEP students were not prepared, and no legal obligation required the schools to overcome their deficiency.

In reviewing the Ninth Circuit's decision, the Supreme Court did not address the students' constitutional claims. It did, however, find in the students' favor relying solely on Title VI as interpreted by the OCR. "There is no equality of treatment," wrote the Court, "merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." To require a child to have already acquired basic English skills before participating in the educational program, said the Court, is to make a mockery of public education. Following the logic of the OCR interpretation, the Court said it was not necessary to show any invidious motivation on the part of the school to establish a Title VI violation. As for the remedy, the Court wrote, "Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others."[75]

It did not take Congress long to embrace the position taken by the OCR and accepted by the Supreme Court. In 1974, Congress adopted the Equal Educational Opportunities Act (EEOA), which provided in part: "[N]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[76] The U.S. Attorney General or students adversely affected by a school's language policy were empowered to file civil actions for denial of equal educational opportunity whether the school intended to discriminate or not.

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[73] Office for Civil Rights, Identification of Discrimination of Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (May 25, 1970).

[74] Lau v. Nichols, 483 F.2d 791, 797 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

[75] Lau v. Nichols, 414 U.S. 563 (1974).

[76] 20 U.S.C. § 1703(f).

In 1975, the OCR issued guidelines to assist school districts in complying with *Lau*.[77] The *Lau* guidelines specifically excluded ESL programs at the elementary level, allowing only transitional bilingual education, bilingual-bicultural education, or multilingual-multicultural education at this level. ESL was permissible at the secondary level. Although they authorized bilingual programs, the guidelines strictly barred racially or ethnically identifiable or isolated schools and classes.

Since the *Lau* guidelines, federal law concerning the rights of LEP students has become confused. First, the Supreme Court or at least a majority of the justices, in a case not concerning bilingual education, *Regents of the University of California v. Bakke*,[78] seemed to change its ruling in *Lau* that Title VI is violated solely by a discriminatory effect where there is no intent to discriminate. The Court added to the confusion in *Guardians Association v. Civil Service Commission*,[79] when four justices said that Title VI violations require proof of intent to discriminate, two said they do not, and three said that proof of intent was necessary to show a violation of Title VI itself, but, if Title VI regulations do not require proof of intent, then proof of intent is not necessary.

Shortly after *Bakke* was decided, the Carter administration proposed a new set of rules intended to replace the *Lau* guidelines.[80] These proposed regulations, the subject of considerable controversy, were never adopted as the new Reagan administration withdrew them. Even the *Lau* guidelines were themselves withdrawn.

Today federal policy has two legal underpinnings: Title VI as interpreted by the original OCR memo and *Lau* and the EEOA. *Lau* has not been specifically overruled nor the EEOA repealed. Thus it remains the case that a school district violates federal law when its programs simply have a discriminatory effect on LEP students.

There has been only limited litigation regarding Title VI and the EEOA. The following case exemplifies a federal court's interpretation of these laws.[81]

CASTANEDA v. PICKARD

United States Court of Appeals for the Fifth Circuit, 1981
648 F.2d 989

Randall, Circuit Judge:

Plaintiffs, Mexican-American children and their parents who represent a class of others similarly situated, instituted this action against the Raymondville, Texas Independent School District (RISD) alleging that the district engaged in policies and practices of racial discrimination against Mexican-Americans which deprived the plaintiffs and their class of rights secured to them by the fourteenth amendment and 42 U.S.C. § 1983 (1976), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1976), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* (1976). Specifically, plaintiffs charged that the school district unlawfully discriminated against them by failing to implement adequate bilingual education to overcome the linguistic barriers that impede the plaintiffs' equal participation in the educational program of the district. . . .

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[77] Office for Civil Rights, Task-Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under Lau v. Nichols, § IX, pt. 5 (1975).

[78] 438 U.S. 265 (1978).

[79] 463 U.S. 582 (1983).

[80] 45 Fed. Reg. 52,052.

[81] *See also*, Serna v. Portales Mun. Sch., 499 F.2d 1147 (10th Cir. 1974); Rios v. Read, 480 F. Supp. 14 (E.D.N.Y. 1978); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987).

The case was tried in June 1978; on August 17, 1978 the district court entered judgment in favor of the defendants based upon its determination that the policies and practices of the RISD, in the area of . . . bilingual education did not violate any constitutional or statutory rights of the plaintiff class. From that judgment, the plaintiffs have brought this appeal in which they claim the district court erred in numerous matters of fact and law. . . .

IV. THE BILINGUAL EDUCATION AND LANGUAGE REMEDIATION PROGRAMS OF THE RAYMONDVILLE SCHOOLS

RISD currently operates a bilingual education program for all students in kindergarten through third grade. The language ability of each student entering the Raymondville program is assessed when he or she enters school. The language dominance test currently employed by the district is approved for this purpose by the TEA [Texas Education Agency]. The program of bilingual instruction offered students in the Raymondville schools has been developed with the assistance of expert consultants retained by the TEA and employs a group of materials developed by a regional educational center operated by the TEA. The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade.

Although the program's emphasis is on the development of language skills in the two languages, other cognitive and substantive areas are addressed, *e.g.*, mathematics skills are taught and tested in Spanish as well as English during these years. All of the teachers employed in the bilingual education program of the district have met the minimum state requirements to teach bilingual classes. However, only about half of these teachers are Mexican-American and native Spanish speakers; the other teachers in the program have been certified to teach bilingual classes following a 100 hour course designed by TEA to give them a limited Spanish vocabulary (700 words) and an understanding of the theory and methods employed in bilingual programs. Teachers in the bilingual program are assisted by classroom aides, most of whom are fluent in Spanish.

RISD does not offer a formal program of bilingual education after the third grade. In grades 4 and 5, although classroom instruction is only in English, Spanish speaking teacher aides are used to assist students having language difficulties which may impair their ability to participate in classroom activities. For students in grades 4–12 having limited English proficiency or academic deficiencies in other areas, the RISD provides assistance in the form of a learning center operated at each school. This center provides a diagnostic/prescriptive program in which students' particular academic deficiencies, whether in language or other areas, are identified and addressed by special remedial programs. Approximately 1,000 of the district's students, almost one-third of the total enrollment, receive special assistance through small classes provided by these learning centers. The district also makes English as a Second Language classes and special tutoring in English available to all students in all grades; this program is especially designed to meet the needs of limited English speaking students who move into the district in grades above 3.

Plaintiffs claim that the bilingual education and language remediation programs offered by the Raymondville schools are educationally deficient and unsound and that RISD's failure to alter and improve these programs places the district in violation of Title VI and the Equal Educational Opportunities Act. . . .

Title VI, like the Equal Protection Clause, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races. Whatever the deficiencies of the RISD's program of language remediation may be, we do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district. Thus, we think it cannot be said that the arguable inadequacies of the program render it violative of Title VI.

Plaintiffs, however, do not base their legal challenge to the district's language program solely on Title VI. They also claim that the district's current program is unlawful under § 1703(f) of the EEOA which makes it unlawful for an educational agency to fail to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." . . .

We do not believe that Congress, at the time it adopted the EEOA, intended to require local educational authorities to adopt any particular type of language remediation program. At the same time Congress enacted the EEOA, it passed the Bilingual Education Act of 1974, 20 U.S.C. § 880b *et seq.* (1976). The Bilingual Educational Act established a program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. The Bilingual Education Act implicitly embodied a recognition that bilingual education programs were still in experimental stages and that a variety of programs and techniques would have to be tried before it could be determined which were most efficacious. Thus, although the Act empowered the U.S. Office of Education to develop model programs, Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own.

We note that although Congress enacted both the Bilingual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Congress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking—prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (*i.e.*, state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators.

In a case such as this one in which the appropriateness of a particular school system's language remediation program is challenged under § 1703(f), we believe that the responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. This, of course, is not to be done with any eye toward discerning the relative merits of sound but competing bodies of expert educational opinion, for choosing between sound but competing theories is properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system. The state of the art in the area of language remediation may well be such that respected authorities legitimately differ as to the best type of educational program for limited English speaking students and we do not believe that Congress in enacting § 1703(f) intended to make the resolution of these differences the province of federal courts. The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.

The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.

Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts

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to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.

With this framework to guide our analysis we now turn to review the district court's determination that the RISD's current language remediation programs were "appropriate action" within the meaning of § 1703(f). Implicit in this conclusion was a determination that the district had adequately implemented a sound program. In conducting this review, we shall consider this conclusion as a determination of a mixed question of fact and law. Therefore we shall be concerned with determining whether this conclusion was adequately supported by subsidiary findings of fact which do not appear clearly erroneous.

In this case, the plaintiffs' challenge to the appropriateness of the RISD's efforts to overcome the language barriers of its students does not rest on an argument over the soundness of the educational policy being pursued by the district, but rather on the alleged inadequacy of the program actually implemented by the district. Plaintiffs contend that in three areas essential to the adequacy of a bilingual program—curriculum, staff and testing Raymondville falls short. Plaintiffs contend that although RISD purports to offer a bilingual education program in grades K–3, the district's curriculum actually overemphasizes the development of reading and writing skills in English to the detriment of education in other areas such as mathematics and science, and that, as a result, children whose first language was Spanish emerge from the bilingual education program behind their classmates in these other areas. The record in this case does not support plaintiffs' allegation that the educational program for predominantly Spanish speaking students in grades K–3 provides significantly less attention to these other areas than does the curriculum used in the English language dominant classrooms. The bilingual education manual developed by the district outlines the basic classroom schedules for both Spanish dominant classrooms and English dominant classrooms. These schedules indicate that students in the Spanish language dominant classrooms spend almost exactly the same amount of classroom time on math, science and social studies as do their counterparts in the predominantly English speaking classrooms. The extra time that Spanish language dominant children spend on language development is drawn almost entirely from what might fairly be deemed the "extras" rather than the basic skills components of the elementary school curriculum, *e.g.*, naps, music, creative writing and physical education.

Even if we accept this allegation as true, however, we do not think that a school system which provides limited English speaking students with a curriculum, during the early part of their school career, which has, as its primary objective, the development of literacy in English, has failed to fulfill its obligations under § 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period. The language of § 1703(f) speaks in terms of taking action "to overcome language barriers" which impede the "equal participation" of limited English speaking children in the regular instructional program. We believe the statute clearly contemplates that provision of a program placing primary emphasis on the development of English language skills would constitute "appropriate action."

Limited English speaking students entering school face a task not encountered by students who are already proficient in English. Since the number of hours in any school day is limited, some of the time which limited English speaking children will spend learning English may be devoted to other subjects by students who entered school already proficient in English. In order to be able ultimately to participate equally with the students who entered school with an English language background, the limited English speaking students will have to acquire both English language proficiency comparable to that of the average native speakers and to recoup any deficits which they may incur in other areas of the curriculum as a result of this extra expenditure of time on English language development. We understand § 1703(f) to impose on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. If no remedial action is taken to overcome the academic deficits that limited English speaking students may incur during a period of intensive language training, then the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to these students' equal participation in the regular instructional program. We also believe, however, that § 1703(f) leaves schools free to determine whether they wish to discharge these obligations simultaneously, by implementing a program designed to keep limited English speaking students at grade level in other areas of the curriculum by providing instruction in their native language at the same time that an English language development effort is pursued, or to address these problems in sequence, by focusing first on the development of English language skills and then later providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period. In short, § 1703(f) leaves schools free to determine the sequence and manner in which limited English speaking students tackle this dual challenge so long as the schools design programs which are reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system. Therefore, we disagree with plaintiffs' assertion that a school system which chooses to focus first on English language development and later provides students with an intensive remedial program to help them catch up in other areas of the curriculum has failed to fulfill its statutory obligation under § 1703(f).

Although we therefore find no merit in the plaintiff's claim that RISD's language remediation programs are inappropriate under § 1703 because of the emphasis the curriculum allegedly places on English language development in the primary grades, we are more troubled by the plaintiffs' allegations that the district's implementation of the program has been severely deficient in the area of preparing its teachers for bilingual education. Although the plaintiffs raised this issue below and introduced evidence addressed to it, the district court made no findings on the adequacy of the teacher training program employed by RISD. We begin by noting that any school district that chooses to fulfill its obligations under § 1703 by means of a bilingual education program has undertaken a responsibility to provide teachers who are able competently to teach in such a program. The record in this case indicates that some of the teachers employed in the RISD bilingual program have a very limited command of Spanish, despite completion of the TEA course. Plaintiffs' expert witness, Dr. Jose Cardenas, was one of the bilingual educators who participated in the original design of the 100 hour continuing education course given to teachers already employed in RISD in order to prepare them to teach bilingual classes. He testified that a subsequent evaluation of the program showed that although it was effective in introducing teachers to the methodology of bilingual education and preparing them to teach the cultural history and awareness components of the bilingual education program, the course was "a dismal failure in the development of sufficient proficiency in a language other than English to qualify the people for teaching bilingual programs." Although the witnesses familiar with the bilingual teachers in the Raymondville schools did not testify quite as vividly to the program's inadequacy, testimony of those involved in the RISD's program suggested that despite completion of the 100 hour course, some of the district's English speaking teachers were inadequately prepared to teach in a bilingual classroom. Mr. Inez Ibarra, who was employed by the district as bilingual supervisor prior to his appointment to the principalship of L.C. Smith School in 1977, testified in the administrative hearing that he had observed the teachers in the bilingual program at Raymondville and that some of the teachers had difficulty communicating in Spanish in the classroom and that there were teachers in the program who taught almost exclusively in English, using Spanish, at most, one day per week. He also described the evaluation program used to determine the Spanish proficiency of the teachers at the end of the 100 hour course. Teachers were required to write a paragraph in Spanish. Since in completing this task, they were permitted to use a Spanish-English dictionary, Ibarra acknowledged that this was not a valid measure of their Spanish vocabulary. Teachers also read orally from a Spanish language text and answered oral questions addressed to them by the RISD certification committee. There was no formal grading of the examination; the certification committee had no guide to measure the Spanish language vocabulary of the teachers based on their performance on the exam. Thus, it may well have been impossible for the committee to determine whether the teachers had mastered even the 700 word vocabulary the TEA had deemed the minimum to enable a teacher to work effectively in a bilingual elementary classroom. Following the examination, the committee would have an informal discussion among themselves and decide whether or not the teacher was qualified. Mr. Ibarra testified that the certification committee had approved some teachers who were, in his opinion, in need of more training—"much more than what they were given."

The record in this case thus raises serious doubts about the actual language competency of the teachers employed in bilingual classrooms by RISD and about the degree to which the district is making a genuine effort to assess and improve the qualifications of its bilingual teachers. As in any educational program, qualified teachers are a critical component of the success of a language remediation program. A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with day-to-day responsibility for educating these children are termed "qualified" despite the fact that they operate in the classroom under their own unremedied language disability. The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot, RISD acknowledges, take the place of qualified bilingual teachers. The record in this case strongly suggests that the efforts RISD has made to overcome the language barriers confronting many of the teachers assigned to the bilingual education program are inadequate. On this record, we think a finding to the contrary would be clearly erroneous. Nor can there be any question that deficiencies in the in-service training of teachers for bilingual classrooms seriously undermines the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking "appropriate action" to overcome the language disabilities of its students. Although we certainly hope and expect that RISD will attempt to hire teachers who are already qualified to teach in a bilingual classroom as positions become available, we are by no means suggesting that teachers already employed by the district should be replaced or that the district is limited to hiring only teachers who are already qualified to teach in a bilingual program. We are requiring only that RISD undertake further measures to improve the ability of any teacher, whether now or hereafter employed, to teach effectively in a bilingual classroom.

On the current record, it is impossible for us to determine the extent to which the language deficiencies of some members of RISD's staff are the result of the inadequacies inherent in TEA's 100 hour program (including the 700 word requirement which may be an insufficient vocabulary) or the extent to which these deficiencies reflect a failure to master the material in that course. Therefore, on remand, the district court should attempt to identify more precisely the cause or causes of the Spanish language deficiencies experienced by some of the RISD's teachers and should require both TEA and RISD to devise an improved in-service training program and an adequate testing or evaluation procedure to assess the qualifications of teachers completing this program.

The third specific area in which plaintiffs claim that RISD programs are seriously deficient is in the testing and evaluation of students having limited English proficiency. Plaintiffs claim first that the language dominance placement test used to evaluate students entering Raymondville schools is inadequate. Although it appears that at the time of the administrative hearing in this case, RISD was not employing one of the language tests approved by the TEA, by the time of the trial in this civil suit RISD had adopted a test approved for this purpose by TEA. None of plaintiffs' expert witnesses testified that this test was an inappropriate one. Thus, we do not think there is any reason to believe that the district is deficient in the area of initial evaluation of students entering the bilingual program.

A more difficult question is whether the testing RISD employs to measure the progress of students in the bilingual education program is adequate. Plaintiffs contend, RISD apparently does not deny, and we agree that proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself. In their brief, plaintiffs contend that RISD's testing program is inadequate because the limited English speaking students in the bilingual program are not tested in their own language to determine their progress in areas of the curriculum other than English language literacy skills. Although during the bilingual program Spanish speaking students receive much of their instruction in these other areas in the Spanish language, the achievement level of these students is tested, in part, by the use of standardized English language achievement tests. No standardized Spanish language tests are used. Plaintiffs contend that testing the achievement levels of children, who are admittedly not yet literate in English and are receiving instruction in another language, through the use of an English language achievement test, does not meaningfully assess their achievement, any more than it does their ability, a contention with which we can scarcely disagree.

Valid testing of students' progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-a-vis that of their English speaking counterparts. Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred. The district court on remand should require both TEA and RISD to implement an adequate achievement test program for RISD in accordance with this opinion. If, following the district court's inquiry into the ability grouping practices of the district, such practices are allowed to continue, we assume that Spanish language ability tests would be employed to place students who have not yet mastered the English language satisfactorily in ability groups.

Finally plaintiffs contend that test results indicate that the limited English speaking students who participate in the district's bilingual education program do not reach a parity of achievement with students who entered school already proficient in English at any time throughout the elementary grades and that since the district's language program has failed to establish such parity, it cannot be deemed "appropriate action" under § 1703(f). Although this question was raised at the district court level, no findings were made on this claim. While under some circumstances it may be proper for a court to examine the achievement scores of students involved in a language remediation program in order to determine whether this group appears on the whole to attain parity of participation with other students, we do not think that such an inquiry is, as yet, appropriate with regard to RISD. Such an inquiry may become proper after the inadequacies in the implementation of the RISD's program, which we have identified, have been corrected and the program has operated with the benefit of these improvements for a period of time sufficient to expect meaningful results.

To summarize, we affirm the district court's conclusion that RISD's bilingual education program is not violative of Title VI; however, we reverse the district court's judgment with respect to the other issues presented on appeal and we remand these issues for further proceedings not inconsistent with this opinion. Specifically, on remand, the district court is to inquire into the history of the RISD in order to determine whether, in the past, the district discriminated against Mexican-Americans, and then to consider whether the effects of any such past discrimination have been fully erased. The answers to these questions should, as we have noted in this opinion, illuminate the proper framework for assessment of the merits of the plaintiffs' claims that the ability grouping and employment practices of RISD are tainted by unlawful discrimination. If the court finds that the current record is lacking in evidence necessary to its determination of these questions, it may reopen the record and invite the parties to produce additional evidence.

The question of the legality of the district's language remediation program under 20 U.S.C. § 1703(f) is distinct from the ability grouping and teacher discrimination issues. Because an effective language remediation program is essential to the education of many students in Raymondville, we think it imperative that the district court, as soon as possible following the issuance of our mandate, conduct a hearing to identify the precise causes of the language deficiencies affecting some of the RISD teachers and to establish a time table for the parties to follow in devising and implementing a program to alleviate these deficiencies. The district court should also assure that RISD takes whatever steps are necessary to acquire validated Spanish language achievement tests for administration to students in the bilingual program at an appropriate time during the 1981–82 academic year.

Affirmed in part, reversed in part and remanded.

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As discussed in *Castaneda*, federal law allows states and local school districts to decide whether to offer bilingual education. In 1998, California voters adopted a referendum amending the California education code to require that "all children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms."[82] California generally prohibits school districts from using bilingual education except for children who have obtained a waiver in accordance with criteria and procedures specified in the law.

Two other issues concerning language proficiency have also been litigated. In *Martin Luther King Jr. Elementary School Children v. Michigan Board of Education*,[83] a federal district court extended the reasoning of *Lau* to require schools to take special steps to address the needs of speakers of the dialect known as Black English. In *Jose P. v. Ambach*,[84] another federal court found that failure to provide bilingual education to LEP disabled students may violate the Rehabilitation Act of 1973 (see sec. 7.2).

In addition to laws designed to define and protect the rights of LEP students, Congress has authorized funds to assist schools in meeting their obligations to these students. Federal aid for bilingual education began with the passage of the Bilingual Education Act of 1968. This was followed by the Bilingual Education Act of 1978 and subsequently by several reauthorizations and amendments.[85] These laws authorize grants for bilingual education projects and provide money for related research and teacher training.

7.5 CLASSIFICATION BY AGE AND ABILITY

When parents claim that a five-year-old should be permitted to start the first grade or that a precocious twelve-year-old ought to be able to skip a grade, they are objecting to age grouping. Similarly, parents may object to their child's placement in a particular ability group or academic track. Parents raising these objections usually argue that exclusion from the desired program violates their child's right to a generally available educational benefit and therefore to the "equal protection of the laws." School officials respond that age and ability grouping is an educationally sound practice that improves the efficiency of the school and helps to ensure, by and large, that children and program are appropriately matched.

Because differential treatment based on age and ability do not trigger the use of the more stringent tests, courts employ the rational-basis test to resolve these disputes. Under this test the plaintiffs must prove either that the age or ability grouping criteria do not serve any legitimate purpose or that the classification is wholly unrelated to its alleged purpose. Despite some evidence that ability grouping in particular is educationally ineffective and even counterproductive, plaintiffs do not usually win these suits. Age and ability grouping are long-standing practices intended to serve legitimate purposes, and despite the contrary evidence, courts do not consider it unreasonable for school officials to believe that these purposes relate to the criteria of classification.[86] The major exception is when tracking is used to create segregated programs within schools.[87]

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[82] Cal. Educ. Code §305.

[83] 451 F. Supp. 1324 (E.D. Mich. 1978).

[84] 3 E.H.L.R. 551:245 (E.D. N.Y. 1979).

[85] 20 U.S.C. §§ 3281–3341.

Parents have the greatest chance of prevailing in a suit attacking ability grouping where the district is under court order to desegregate and the grouping has the effect of perpetuating racial segregation.[88] Similarly, parents may be successful if they can prove that tests and other procedures used to assign pupils to programs have a discriminatory impact on racial minorities and that the procedures were chosen because of this impact rather than in spite of it.[89]

State law and regulations may also provide a basis for objecting to a child's educational placement or program on equity grounds. For example, many states have laws mandating special educational services for gifted students. On the basis of one of these laws, parents in Pennsylvania were successful in establishing that their local school district had an obligation to provide their gifted child with an enrichment program including advanced instruction in reading and math. The court made clear that the district's obligation was not to maximize the student's achievement nor to become a "Harvard or a Princeton to all who have IQ's over 130," but the district did have an obligation "to bring their talents to as complete fruition as our facilities allow."[90] However, courts have rejected claims that gifted children have a constitutional or statutory right to start school younger than state statute prescribes.[91]

7.6 SUMMARY

This chapter considered a number of pupil characteristics that justify the provision of an educational program that differs from the one most students receive. In all cases, differential treatment must meet the requirements of the Equal Protection Clause that it at least be rationally related to a legitimate state goal. In most instances, classifications based on the characteristics considered in this chapter—certain physical and mental disabilities, limited English proficiency, age, and intellectual ability—do meet this requirement.

In addition, federal statutes and, arguably, the Equal Protection Clause as well, require that disabled and limited English proficiency students receive an education from which they may reasonably be expected to benefit.

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[86] Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981); Hammond v. Marx, 406 F. Supp. 853 (D. Me. 1975).

[87] McNeal v. Tate County Sch. Dist., 508 F.2d 1017 (5th Cir. 1975); Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975); Moses v. Washington Parish Sch. Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F.2d 1285 (5th Cir. 1972) (per curiam); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom*, Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969) (en banc).

[88] McNeal v. Tate County Sch. Dist., 508 F.2d 1017 (5th Cir. 1975); Bester v. Tuscaloosa City Bd. of Educ., 722 F.2d 1514 (11th Cir. 1984).

[89] Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984).

[90] Centennial Sch. Dist. v. Department of Educ., 539 A.2d 785 (Pa. 1988).

[91] Zweifel v. Joint Dist. No. 1, 251 N.W.2d 822 (Wis. 1977).

The education of the disabled is regulated by three statutes, the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. The first two laws prohibit discrimination on the basis of disability, and the last law makes federal money available to states and districts that follow certain guidelines.

The purpose of these laws is to provide disabled children with a free appropriate public education designed to meet their individual educational needs. School districts must seek out disabled children within their jurisdiction, provide each with a nondiscriminatory, multidisciplinary evaluation of strengths and weaknesses, develop in accordance with each disabled student's evaluation an individualized educational program consisting of special education and related services, and provide services in the least restrictive environment. Disabled students must be educated in a manner designed to meet measurable goals. Throughout the process, there must be parental participation and the observance of certain procedural safeguards.

The law regarding the treatment of limited English proficiency students is not nearly as extensive. However, Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunity Act of 1974 both require schools to take "appropriate action" to ensure that LEP students are not functionally excluded from meaningful participation in their programs. Appropriate action may include English as a second language instruction, special immersion programs designed to foster English proficiency, and various forms of bilingual education, but not programs that create racial and ethnic segregation. In addition, the Bilingual Education Act of 1978 makes federal funds available for bilingual education projects.

Age grouping and most forms of ability grouping and tracking, although not mandated by considerations of equity, generally survive challenges based on the Equal Protection Clause. The major exception is when grouping or tracking leads to increased racial segregation in a district under court order to desegregate.

CHAPTER 8

SCHOOL FINANCE

The federal government, state governments, county and other intermediate units of government, municipal governments, and local school boards all contribute to the funding of public education. Money is collected through a variety of mechanisms including federal and state income taxes, state lotteries, sales and property taxes, and the issuance of bonds. Money is in turn distributed from higher levels of government to local school boards in various ways including categorical grants (money given for a specific program or purpose), block grants (money that may be utilized for any of a number of specified purposes), general state aid (money that can be used for any legal purpose), state reimbursement for local expenditures, direct state provision of services, and transfers from municipal governments to local school boards. Local school boards themselves, in accordance with state law, must implement their own taxing authority. In addition, they must establish management systems for handling the money they have raised or received from other units of government. A system this complex and involving large amounts of public funds inevitably raises many legal issues. These issues can be divided into two categories:

1. **Pure finance issues** concern taxation and utilization of funds for education generally. Litigation in this category has dealt with property tax assessments and exemptions, procedures for imposing a tax or adopting a budget, disposition of assets and liabilities when school district boundaries are altered or dissolved, school accounting procedures, administration of school funds, insurance, sale and disposition of school property, the issuance and sale of bonds, limits on indebtedness, and procedures for bidding on contracts.
2. **Issues of educational equity and adequacy** concern constitutional and statutory mandates for the provision of services and equality of opportunity. Litigation in this category has challenged interdistrict as well as intradistrict inequalities in per pupil expenditures; fees charged to pupils for tuition, books, and extracurricular activities; the authority

of local school boards to spend money for particular purposes; and the overall quality of education provided in a school, school district, or state.

This chapter focuses on finance issues of direct relevance to educational policy and practice. Most of these issues fall into the category of educational equity and adequacy, but many of the principles and cases presented also touch on questions of pure finance. The chapter begins by providing an overview of the school finance system necessary for understanding the legal issues discussed subsequently.

8.1 A LEGAL PERSPECTIVE ON SCHOOL FINANCE

The starting point for understanding the legal framework of educational finance is that there is no federal constitutional right to an education. The U.S. Constitution imposes no obligation on either the federal or state government to operate a system of public education or to assist parents in financing private education. Thus, any government effort to establish a system of public schools is, in a legal sense, voluntary. However, once government does undertake to provide a system of public schools, its effort must conform to constitutional requirements.

Given that there is no government duty under the federal Constitution to fund education, the next question is whether government has the authority to provide money for schools. At one time, this was a controversial issue at least regarding the federal government. In theory, the federal government possesses only those powers specifically delegated to it by the people through the Constitution. But the Constitution contains no express delegation to Congress of authority to spend money or do anything else with regard to education.

Though Congress has provided some assistance to education since the Northwest Ordinance of 1787, its constitutional authority was not firmly grounded until 1936. In that year, the Supreme Court decided that Article I, Section 8, the General Welfare Clause, gave Congress the power to tax and spend for activities not specifically mentioned in the Constitution.[1] Thus, the General Welfare Clause justifies the many federal grant programs Congress has authorized for elementary and secondary schools. In total, these grants amount to about six percent of the funds expended for kindergarten through twelfth-grade (K–12) education. As discussed in previous chapters, Congress exercises considerable influence over certain facets of education through requirements that local districts must satisfy if they wish to receive federal funds.

But what of the states? Where do they obtain the authority to tax and spend on behalf of education? The answer begins with the Tenth Amendment to the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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[1] United States v. Butler, 297 U.S. 1 (1936).

Because power over education is not specifically delegated to the federal government, education is one of the powers reserved to the states. Thus, states have inherent power to tax and spend for education, if they so choose. The people of each state, through their state constitutions, have in turn required their legislatures to exercise this power. For example, Article XII, Section 1 of the West Virginia Constitution provides: "The legislature shall provide, by general law, for a thorough and efficient system of free schools."

Although some constitutions make brief mention of local school districts, most leave it entirely to the legislature to decide whether the state shall provide funds for education directly to parents, create and operate schools itself, or delegate this authority to local school boards. In any case, with the exception of Hawaii where the schools are state-run, all states have chosen to create local school districts as the primary mechanism for fulfilling their educational duty.

Having chosen this option, legislatures must next decide how these locally-run school districts are to be funded. For historical and political reasons, most states have a multifaceted finance system involving the following features:

1. A statewide system of taxation, usually sales and income tax, for general revenue, some of which is used to fund schools. Some states also have a specialized mechanism for raising money for education such as a lottery.
2. A plan for the distribution of state funds to local school districts. These plans may include general financial aid distributed through formulas adopted by the legislature, grant and categorical aid programs, and reimbursement for the provision of state-mandated services.
3. Delegation to local government units, such as city councils, of the authority and duty to tax for education with the money raised to be turned over to local school boards.
4. Delegation to local school boards of the authority to tax and spend on behalf of their local schools usually through the mechanism of a local property tax.
5. Delegation of the authority to local school boards to borrow money, typically by issuing bonds, for construction projects.

Any authority local school boards enjoy to levy taxes for their schools is delegated by the state legislature. Any taxation by a local board must be based on expressly granted or implied authority and must conform to that authority.[2] In addition to the authority to tax, school boards may have a duty to tax for certain educational purposes. This duty can and must be exercised even against the wishes of the taxpayers.[3] Each state also has a detailed set of statutory requirements controlling the raising, management, allocation, and expenditure of money by local boards.

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[2] Manges v. Freer Indep. Sch. Dist., 653 S.W.2d 553 (Tex. App. 1983), *rev'd on other grounds*, 677 S.W.2d 488 (Tex. 1984).

In sum, the U.S. school finance system operates in conjunction with a complex school governance system comprising fifty separate state systems of education. With the exception of Hawaii, these systems rely on local school districts with significant authority to raise and spend money. State legislatures supplement these local funds in a variety of ways—most important, through general aid distribution allocated on the basis of complex formulas. Local school districts also receive federal financial assistance, mostly in the form of categorical aid and block grants.

This complex system has resulted in significant interstate and, in most states, interdistrict disparities in per pupil funding. Interstate disparities arise from varying capacities and desires to fund education in different school districts. Federal financial assistance does nothing to equalize per pupil funding from state to state. In most states, interdistrict disparities result from heavy reliance on money raised by local school districts through the property tax. State aid generally has only a modest equalizing effect on per pupil expenditures.

8.2 THE FEDERAL CONSTITUTION AND SCHOOL FINANCE

Disparities in per pupil expenditures from state to state do not violate the Constitution. There is no constitutional provision that requires the states to adopt the same educational policies nor that requires the federal government to counteract interstate inequalities in the provision of education or any other benefit or service. The Equal Protection Clause is not concerned with interstate inequalities or with anything the federal government does. Rather, the clause addresses only state action and intrastate inequalities (see sec. 6.1). Hence, unless Congress decides to address interstate inequalities or the states themselves voluntarily seek to adopt uniform educational finance policies, interstate differences in expenditures per pupil will remain.

By virtue of Article VI of the Constitution, state law and policy may not contradict federal law. Thus, in *Lawrence County v. Lead-Deadwood School District No. 40-1*,[4] the Supreme Court invalidated a state law directing local school boards to allocate certain federal funds according to state guidelines. The federal law granting the funds to local districts indicated that Congress intended them to be utilized at the discretion of the local board. Therefore, the state's attempt to control the funds was unconstitutional.

The most significant federal constitutional provisions affecting school finance are the First and Fourteenth Amendments. The implications of the First Amendment's religion clauses for state financing of education are discussed in chap. 2. The Fourteenth Amendment's Equal Protection Clause

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[3] State v. Board of Comm'rs of Elk County, 58 P. 959 (Kan. 1899).

[4] 469 U.S. 256 (1985).

prohibits intentional racial discrimination in taxation or the allocation of funds. Even under the old separate-but-equal standard providing unequal educational services on the basis of race was unconstitutional (see chap. 6).

What about state systems of finance that result in interdistrict inequalities in the amount of money spent per pupil? Is it consistent with the Equal Protection Clause that the amount of money spent by a state on a child's public education varies dramatically depending on where in the state the child lives? The Supreme Court considered this issue in *San Antonio Independent School District v. Rodriguez*.[5]

Plaintiffs' argument in *Rodriguez* was lengthy and complex and only its major claims are summarized here. Plaintiffs first sought to show that interdistrict inequalities in per pupil spending were a direct result of state law and policy. Texas, like most states, had created local school districts with the authority and duty to raise taxes for their own schools. The primary revenue-raising mechanism delegated to the districts was the property tax. Different school districts had within their borders widely varying amounts of property wealth per pupil. Districts that were rich in terms of property value per pupil were able, with a given tax rate, to raise more money per pupil than districts that were poor. Property-poor districts could attempt to match the money raised by property-rich districts by adopting much higher tax rates but this was politically and economically infeasible in most places. Thus, given that neither state nor federal aid compensated for differences in local property tax revenues, poor districts had significantly less to spend per pupil than wealthy districts.

Realizing that their chances of winning would be greatly enhanced if the Court employed strict scrutiny in evaluating their claim, plaintiffs next sought to establish that this was the appropriate standard. Two arguments supported their position. First, Texas's school finance system discriminated among students on the basis of the property wealth of their district of residence. This, plaintiffs claimed, was a form of wealth-based discrimination, which, like discrimination on the basis of race, ought to trigger the use of the strict scrutiny test. In support of this claim, they cited a body of cases that dealt with very different forms of wealth discrimination and argued that most of those disadvantaged by the system were members of minority groups.

Second, plaintiffs argued that education is a "fundamental interest" and that when public policy discriminates regarding a fundamental interest, the strict scrutiny test ought to be used. Even though not expressly mentioned in the Constitution, education, they said, is a fundamental right because of its social importance and because a good education is necessary to the effective exercise of other constitutional rights such as freedom of speech.

The next step in the argument was to show that the Texas system of finance could not survive strict scrutiny. Plaintiffs rejected Texas' claim that its finance system was necessary to achieve a compelling state interest, namely the provision of an effective, locally controlled system of education.

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[5] 411 U.S. 1 (1973).

They argued that the state's funding plan did not minimize administrative difficulties, did not maintain effective or meaningful local control, and did not foster an equitable distribution of educational services. In sum, they claimed, the system did not serve any purpose other than "to make wealth the basis for determining the allocation of education dollars." Neither did the state's funding plan assure all students a minimum education "unless one defines that minimum as simply the lowest level of expenditure in the State."

To be permissible under the Equal Protection Clause, argued the plaintiffs, a state system of educational finance had to meet a standard known as "fiscal neutrality." Fiscal neutrality requires that the quality of education in a school district as measured by per pupil expenditures may not be a function of the district's wealth but only of the total wealth of the state. Plaintiffs went on to suggest three possible finance systems that satisfied fiscal neutrality while preserving local control of education. First, the state could take over the raising of money for education and distribute equal amounts per pupil to the local districts. Local districts would then have the discretion of using this money according to their educational priorities. Second, local district boundaries could be changed to ensure that each school district had the same property wealth per pupil. Third, existing boundaries could be maintained, but the state could guarantee through a revised state aid formula that a given property tax rate would yield a specific amount of money regardless of a district's property values.

This last system is known as **power equalization**. In power equalization, if a district raises less money per pupil than guaranteed by the aid formula, the state provides the balance. If a district raises excess money, the state takes it for use in other districts. Districts would still be free to choose different tax rates, and there still would be interdistrict inequalities in the amount of money spent per pupil; however, these differences would be determined not by interdistrict differences in property wealth but only by the differences in the importance different districts placed on education.

Finally, plaintiffs' argument rested on the premise that differences in spending resulted in meaningful disparities in services, program quality, and, ultimately, educational achievement. In their brief, they urged the Court not to reserve application of the Equal Protection Clause to cases of complete denial of educational services but to apply it to relative deprivations as well:

> To be sure, a complete denial of all educational opportunity is more compelling than a relative denial. But in view of the magnitude of the differences in the capacity of state-created school districts in Texas to raise education dollars, and in light of the vast disparities in educational expenditures between districts, plaintiffs have surely been injured in a comparable way. A complete denial of all educational opportunity is not necessary to demonstrate an unconstitutional deprivation. . . . Can the State of Texas open its doors to the poor, compel their attendance . . . . and then effectively deprive them of an equal educational opportunity because of their economic status?

As the following excerpt shows, the Supreme Court answered plaintiffs' question in the affirmative: Relative deprivations of education, at least those arising from Texas' educational finance system, did not violate the Equal Protection Clause.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ

Supreme Court of the United States, 1973
411 U.S. I

Mr. Justice Powell delivered the opinion of the Court.

I.

. . . We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. . . .

II.

A.

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States, is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. . . . The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. . . .

Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that . . . the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts. Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.' " The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures "every child in every school district an adequate education." No proof was offered at trial persuasively discrediting or refuting the State's assertion.

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.* . . .

This brings us, then, to the third way in which the classification scheme might be defined—district wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to bottom, the disadvantaged class might be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the most on education. . . .

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention. They also assert that the State's system impermissibly interferes with the exercise of a "fundamental" right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.

B.

. . . Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . .

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

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*An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment. . . .

Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid—was implemented in an effort to *extend* public education and to improve its quality. Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. . . .

C.

We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause. . . .

In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." . . . Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. . . .

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention. . . .

III.

Because of differences in expenditure levels occasioned by disparities in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination. The District Court found that the State had failed even "to establish a reasonable basis" for a system that results in different levels of per-pupil expenditure. We disagree.

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State. . . .

While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. . . .

No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of "some inequality" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. . . . Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion "less drastic" disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools. The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on "happenstance." They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local government units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others. Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. . . .

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. . . .

IV.

[A] cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. . . .

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question—these groups stand to realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, i.e., in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts. Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts. Additionally, several research projects have concluded that any financing alternative designed to achieve a greater equality of expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers, a result that would exacerbate rather than ameliorate existing conditions in those areas.

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. . . . We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

[Stewart filed a concurring opinion. Brennan, White, Douglas, and Marshall dissented in three separate opinions.]

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The next Supreme Court case concerning educational finance, *Plyler v. Doe*,[6] dealt not with relative deprivations but rather with a Texas law that totally excluded illegal alien children from obtaining a free public education. Although illegal alienage is not a suspect classification, the *Plyler* Court found that total denial of education to any child in the state's jurisdiction violated the Equal Protection Clause. However, the relationship of this decision to *Rodriguez* is a bit confusing. Although the *Rodriguez* Court suggested that an absolute denial of education would probably require the use of the strict scrutiny test, in *Plyler* the Court said even an absolute denial did not call for strict scrutiny. Instead, the Court used a sort of middle-level test similar to the one used in gender discrimination cases.

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[6] 457 U.S. 202 (1982).

The Court's next school finance decision, *Papasan v. Allain,*[7] involved a challenge to a Mississippi policy of distributing income from state-owned land only to school districts where the land was located. The opinion makes clear that this situation is distinguishable from *Rodriguez*. Whereas inequalities upheld in *Rodriguez* were a "necessary adjunct of allowing meaningful local control over school funding," *Papasan* raised a problem of "a state decision to divide state resources unequally among school districts." The Court remanded the case to the lower courts to address the question of whether the state's policy of using income from these lands only in part of the state violated the Equal Protection Clause.

This decision adds to our uncertainty about constitutional doctrine in this area. The Court in *Papasan* announced that neither *Rodriguez* nor *Plyler* "definitively settled the questions whether a minimally adequate education was a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."

Two years later, in *Kadrmas v. Dickinson Public Schools,*[8] the Supreme Court considered the issue of whether a state scheme that permitted older "nonreorganized" school districts but not "reorganized" districts to charge a busing fee violated the Equal Protection Clause. Plaintiffs argued that the fee had the potential to result in a complete deprivation of education for children whose families were too poor to pay. Plaintiffs urged the Court to apply strict scrutiny or, at minimum, the "heightened" scrutiny used in *Plyler*. However, the Court saw the case as different from *Plyler*:

> Unlike the children in that case, Sarita Kadrmas has not been penalized by the government—for illegal conduct by her parents. On the contrary, Sarita was denied access to the school bus only because her parents would not agree to pay the same user fee charged to all other families that took advantage of the service. Nor do we see any reason to suppose that this user fee will "promot[e] the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."

Nor did the Court view the busing fee as amounting to a complete denial of education for any child. Paying the fee was not a prerequisite for attending school because children were free to come to school by means other than riding the school bus. It did not matter that for children living far from school, the school bus was the only practical alternative available.

Having concluded that "the statute challenged in this case discriminates against no suspect class and interferes with no fundamental right," the

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[7] 478 U.S. 265 (1986).
[8] 487 U.S. 450 (1988).

Court applied the rational-relation test to the claim that the busing fee was unconstitutional:

> Applying the appropriate test—under which a statute is upheld if it bears a rational relation to a legitimate government objective—we think it is quite clear that a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible. The Constitution does not require that such service be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free. No one denies that encouraging local school districts to provide school bus service is a legitimate state purpose or that such encouragement would be undermined by a rule requiring that general revenues be used to subsidize an optional service that will benefit a minority of the district's families. It is manifestly rational for the State to refrain from undermining its legitimate objective with such a rule.

The Court went on to consider the related claim that the statute violated the Equal Protection Clause because it permitted user fees for bus service only in nonreorganized school districts. Employing the rational-basis test, the Court concluded that the appellants had failed to demonstrate that the challenged statute was arbitrary and irrational. The Court accepted the state's justification for the statute, that it was designed to encourage school district reorganization:

> . . . it is evident that the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans. Because this purpose could have no application to nonreorganized districts, the legislature could just as rationally conclude that those districts should have the option of imposing user fees on those who take advantage of the service they are offered.

After *Rodriguez*, *Plyler*, and *Kadrmas*, federal constitutional doctrine concerning the status of education may be summarized as follows: Education is not a fundamental right under the U.S. Constitution. Neither interstate nor intrastate inequalities in educational opportunities (unless based on intentional racial or gender discrimination) nor policies that create economic obstacles for children wishing to exercise their legal right to attend school violate the Equal Protection Clause. However, any state scheme intentionally resulting in a total denial of education to any group of children within the jurisdiction of the state is unconstitutional.

8.3 STATE CONSTITUTIONS AND SCHOOL FINANCE

Following the failure of the plaintiffs in *Rodriguez*, reformers seeking judicial mandates for change in state educational finance systems realized they must turn to state courts. To date, there have been approximately fifty state judicial proceedings in thirty-eight states.[9] Challenges to state educational finance systems succeeded in Alabama, Arizona, Arkansas, California, Connecticut, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, Tennessee, Kentucky, Texas, Washington, West Virginia, Wisconsin, and Wyoming. Litigation failed in the state courts of Colorado, Georgia, Idaho, Illinois, Kansas, Maine, Maryland, Rhode Island, Michigan, Minnesota, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, and Virginia. In some of the states where litigation failed, reformers, in some instances with judicial support, later convinced the legislature to change the system of educational finance even in the absence of a court order.

The arguments challenging state systems of educational finance have taken a number of different forms. The main issue in New Hampshire was taxpayer equity. The state constitution permitted the legislature to "impose and levy proportional and reasonable assessments, rates, and taxes. . . ." The state's main mechanism for funding education was a locally imposed property tax, and the tax rates in various school districts around the state varied significantly. The state's highest court found the taxing mechanism unconstitutional because it unreasonably placed a differential burden on taxpayers to carry out the responsibility of providing education throughout the state. Wrote the court, "There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty."[10]

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[9] **Successful cases:** DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (1989), *modified*, 784 P.2d 412 (Mont. 1990); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Abbott v. Burke, 575 A.2d 359 (1985), 575 A.2d 359 (1990), 643 A.2d 575 (1994), and 693 A.2d 417 (N.J. 1997); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelley, 255 S.E.2d 859 (W.Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (1989) and 804 S.W.2d 491 (Tex. 1991); Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 1[illegible]9 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Meno, 893 S.W.2d 450 (Tex. 1995); Brigham v. State, 692 A.2d 384 (Vt. 1997); Campbell County Sch. Dist. v. Ohman, 907 P.2d 1238 (Wyo. 1995); **Unsuccessful cases:** Shofstall v. Hollins 515 P.2d 590 (Ariz. 1973); Lujan v. Colorado State Bd. of Educ. 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Board of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 (1983); Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council of Okla., Inc. v. Oklahoma, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Unified Sch. Dist. 229 v. State, 885 P.2d 1170 (Kan. 1994); School Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854 (Me. 1994); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Bismark Pub. Sch. #1 v. State, 511 N.W.2d 247 (N.D. 1994); Coalition For Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Pawtucket v. Sundlan, 662 A.2d 40 (R.I. 1995); Scott v. Virginia, 443 S.E.2d 138 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568 (Wisc. 1989).

[10] Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997).

A number of other cases have similarly raised constitutional challenges to differing levels of taxation as part of a broad assault on a state educational finance system. A Kansas case challenged the state's system of locally-set property tax rates on the basis of the "uniform laws" clause of the state constitution.[11] An unsuccessful New York case was based on a principle known as "municipal overburden." Plaintiffs argued that the state finance system was inequitable to the students and taxpayers of urban areas because it did not account for the need of urban taxpayers to support a greater variety of public services, the need for urban schools to educate a disproportionate number of high-cost students, the higher costs in urban areas for educational goods and services, and the loss of revenues under attendance-based state aid formulas in urban areas because of high rates of student absenteeism.[12]

Most cases challenging state education funding systems are based on either the equal protection clause of the state constitution or on the education article of the state constitution. Most of the earlier cases were based on state equal protection clauses, whereas more recent cases tend to rely primarily on education articles or on both. State equal protection clause cases often parallel *Rodriguez* in arguing that it is unconstitutional for a state to maintain a funding system that provides greater per pupil funding in some districts than others, or they may claim that the state equal protection clause prohibits a system that provides an "adequate" education to some children and an inadequate education to others.

Plaintiffs succeed in these cases if the court finds that education is a fundamental right under the state constitution, thereby requiring the use of strict scrutiny. This was the approach taken by the California Supreme Court in one of the earliest educational finance reform cases, *Serrano v. Priest* (see case below). However, a number of state courts have declined to view education as a fundamental right under the state constitution. That the state constitution designates education as a required state service does not make it a fundamental right, say these courts. The Georgia Supreme Court agreed with plaintiffs that education was "vital," but said the court, no more vital than police and fire protection, water, and public health services. None of these goods or services is a fundamental right that must be provided equally to all state residents. Applying the rational-basis test, the court paralleled *Rodriguez* in finding that the state's funding system, despite significant disparities in per pupil funding across districts, was rationally related to the legitimate purpose of promoting local control of education.[13] However, even if education is not a fundamental state right, a state finance system may still violate the state equal protection clause if the funding disparities between rich and poor districts are completely irrational: "Even without deciding whether the right to a public education is fundamental," wrote the Arkansas Supreme Court, "we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts."[14]

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[11] Mock v. Kansas, Case No. 91-CV-1009 (Shawnee Cty. Dist. Ct. Kan. 1991).

[12] Board of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983).

[13] McDaniel v. Thomas, 285 S.E.2d 15 (Ga. 1981); *see also*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Cincinnati City Sch. Dist. v. Walter, 390 N.E.2d 813 (Ohio 1979).

SERRANO v. PRIEST (Serrano I)

Supreme Court of California, 1971
487 P.2d 1241

Sullivan, Justice.

[Plaintiffs, Los Angeles County public school children and their parents, filed a complaint that set forth two central causes of action. First, the plaintiffs alleged that California's system of finance relied heavily on local property taxes resulting in substantial disparities in the amount of money spent per pupil among the districts of the state. Districts with smaller tax bases were not able to spend as much money per pupil as districts with larger assessed valuations. These disparities, claimed the plaintiffs, meant that children attending the property-poorer districts received a substantially inferior education in violation of the equal protection clauses of both the U.S. and California constitutions. Second, the plaintiffs alleged that as a result of this financing scheme they were required to pay a higher tax rate than taxpayers in many other districts in order to obtain for their children a similar or inferior education.

The defendants demurred claiming that none of the claims stated facts sufficient to constitute a cause of action. The trial court sustained the demurrer and dismissed the complaint; the plaintiffs appealed. On appeal the California Supreme Court assumed the facts alleged by the plaintiffs were correct for purposes of deciding whether the facts as alleged were legally sufficient to establish a violation of the two equal protection clauses. The court observed that the plaintiffs had alleged that the finance system of the state, with its heavy reliance on the local property tax, resulted in differences in the amount of money spent per pupil and that these differences were not equalized by the state aid flowing to the districts. The state aid consisted of both a "flat grant" and "equalization aid" provided in inverse proportion to the property wealth of the district. Another separate program provided "supplemental aid" to subsidize particularly poor school districts that were willing to make an extra local tax effort. These three sources of state aid did mitigate the disparities among the districts, yet the plaintiffs alleged vast disparities in the money available still persisted among the districts. The range in expenditures went from $577.49 to $1,231.72 per pupil.]

III.

[W]e now take up the chief contention underlying plaintiffs' complaint, namely that the California public school financing scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

As recent decisions of this court have pointed out, the United States Supreme Court has employed a two-level test for measuring legislative classifications against the equal protection clause. "In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.

"On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."

A. Wealth as a Suspect Classification

In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain "suspect" personal characteristics. One factor which has repeatedly come under the close scrutiny of the high court is wealth. "Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored." . . .

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[14] Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).

Plaintiffs contend that the school financing system classifies on the basis of wealth. We find this proposition irrefutable. . . . [O]ver half of all educational revenue is raised locally by levying taxes on real property in the individual school districts. Above the foundation program minimum ($355 per elementary student and $488 per high school student), the wealth of a school district, as measured by its assessed valuation, is the major determinant of educational expenditures. Although the amount of money raised locally is also a function of the rate at which the residents of a district are willing to tax themselves, as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts. For example, Baldwin Park citizens, who paid a school tax of $5.48 per $100 of assessed valuation in 1968–1969, were able to spend less than half as much on education as Beverly Hills residents, who were taxed only $2.38 per $100.

Defendants vigorously dispute the proposition that the financing scheme discriminates on the basis of wealth. Their first argument is essentially this: through *basic* aid, the state distributes school funds equally to all pupils; through *equalization* aid, it distributes funds in a manner beneficial to the poor districts. However, state funds constitute only one part of the entire school fiscal system. The foundation program partially alleviates the great disparities in local sources of revenue, but the system as a whole generates school revenue in proportion to the wealth of the individual district. . . .

But, say defendants, the expenditure per child does not accurately reflect a district's wealth because that expenditure is partly determined by the district's tax rate. Thus, a district with a high total assessed valuation might levy a low school tax, and end up spending the same amount per pupil as a poorer district whose residents opt to pay higher taxes. This argument is also meritless. Obviously, the richer district is favored when it can provide the same educational quality for its children with less tax effort. Furthermore, as a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts. Thus, affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all.

Finally, defendants suggest that the wealth of a school district does not necessarily reflect the wealth of the families who live there. The simple answer to this argument is that plaintiffs have alleged that there is a correlation between a district's per pupil assessed valuation and the wealth of its residents and we treat these material facts as admitted by the demurrers.

More basically, however, we reject defendants' underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing. . . .

B. Education as a Fundamental Interest

But plaintiffs' equal protection attack on the fiscal system has an additional dimension. They assert that the system not only draws lines on the basis of wealth but that it "touches upon," indeed has a direct and significant impact upon, a "fundamental interest," namely education. It is urged that these two grounds, particularly in combination, establish a demonstrable denial of equal protection of the laws. To this phase of the argument we now turn our attention.

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests—rights of defendants in criminal cases. Plaintiffs' contention—that education is a fundamental interest which may not be conditioned on wealth—is not supported by any direct authority.

We, therefore, begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. "[T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." Thus, education is the lifeline of both the individual and society.

The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions—while not *legally* controlling on the exact issue before us—are persuasive in their accurate factual description of the significance of learning. . . .

It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote—two "fundamental interests" which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "[E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which—to the state—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few."

The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of other basic civil and political rights. . . ."

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny." . . .

We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest."

First, education is essential in maintaining what several commentators have termed "free enterprise democracy." . . .

Second, education is universally relevant. "Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education. . . ."

Third, public education continues over a lengthy period of life—between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state.

Finally, education is so important that the state has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. In this context, it has been suggested that "a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years."

C. The Financing System Is Not Necessary to Accomplish a Compelling State Interest

We now reach the final step in the application of the "strict scrutiny" equal protection standard—the determination of whether the California school financing system, as presently structured, is necessary to achieve a compelling state interest.

The state interest which defendants advance in support of the current fiscal scheme is California's policy "to strengthen and encourage local responsibility for control of public education." We treat separately the two possible aspects of this goal: first, the granting to local districts of effective decision-making power over the administration of their schools; and second, the promotion of local fiscal control over the amount of money to be spent on education.

The individual district may well be in the best position to decide whom to hire, how to schedule its educational offerings, and a host of other matters which are either of significant local impact or of such a detailed nature as to require decentralized determination. But even assuming arguendo that local administrative control may be a compelling state interest, the present financial system cannot be considered necessary to further this interest. No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts.

The other asserted policy interest is that of a local district to choose how much it wishes to spend on the education of its children. . . .

We need not decide whether such decentralized financial decision-making is a compelling state interest, since under the present financing system, such fiscal freewill is a cruel illusion for the poor school districts. We cannot agree that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends over $1,200. As defendants themselves recognize, perhaps the most accurate reflection of a community's commitment to education is the rate at which its citizens are willing to tax themselves to support their schools. Yet by that standard, Baldwin Park should be deemed far more devoted to learning than Beverly Hills, for Baldwin Park citizens levied a school tax of well over $5 per $100 of assessed valuation, while residents of Beverly Hills paid only slightly more than $2.

In summary, so long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option. . . .

The judgment is reversed and the cause remanded to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time within which to answer.

* * *

The *Serrano* opinion, issued prior to *Rodriguez*, was decided on both U.S. Constitution and California constitution grounds. The California court's interpretation of the federal Equal Protection Clause was effectively overruled by *Rodriguez*; however, the ruling based on the California constitution still stands.[15] Recall that state high courts have the final say regarding the meaning of their state constitution.

Like the *Serrano* court, the Texas Supreme Court objected to the state's educational finance system because wealthy school districts could raise more money with the same tax rate than poorer ones. However, unlike *Serrano*, the Texas case was based on the education article of the Texas constitution. The Texas state constitution says that in order to promote a "general diffusion of knowledge," the legislature should make "suitable provision" for an "efficient" system of education. In finding the Texas system unconstitutional under this provision, the Texas Supreme Court said that the framers of the state constitution did not "intend a system with such vast disparities as now exist. . . . The present system . . . provides not for a diffusion of knowledge that is general, but for one that is limited and unbalanced." Thus, said the court, "districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort." That is, a given tax rate in a property-poor district should yield about the same revenues per pupil as would that tax rate in a property-rich district.[16]

Unlike state equal protection clauses, the education articles of state constitutions vary considerably: Some simply impose a duty on the state legislature to provide for a system of free public schools, some impose minimum quality standards such as the requirement that a state's school system be "thorough and efficient" or "suitable," some identify the goals of schooling (e.g., "a general diffusion of knowledge" or "promotion of intellectual, scientific, moral and agricultural improvement"), and some declare that the provision of education is the primary or paramount duty of the state. Regardless of their specific wording, education articles may be the basis of a claim that a state's provision of funding for education fails to provide a minimally adequate education to some or all of the state's children. Some education articles may also support equity claims (e.g., a system of educational finance that provides much more money for some pupils than others is not "efficient" or "suitable").

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[15] Seranno v. Priest (Seranno II), 557 P.2d 929 (Cal. 1976).

[16] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

There appears to be no pattern to the outcome of state education article cases either based on the wording of the education article or the specifics of the finance system under challenge. Given that no state's current system of finance is perfectly equitable, it simply appears that some courts are willing to try to improve educational finance systems through judicial activism and others are more inclined to defer to the legislature. Some state courts have simply said that funding inequities do not prove that the state's educational system is inadequate.[17] Pennsylvania's highest court strongly expressed its preference for judicial restraint in educational policy making, noting that it would be

> contrary to the 'essence' of the Constitutional provision for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required 'normal' program of educational services. It is only through free experimentation that the best possible educational services can be achieved. Even were this Court to attempt to define the specific components of a 'thorough and efficient education' in a manner which would foresee the needs of the future, the only judicially manageable standard that this Court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures. Even appellants recognize, however, that expenditures are not the exclusive yardstick of educational quality. . . . The educational product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized.[18]

The Georgia Supreme Court, quoting from the *Rodriguez* decision, agreed with plaintiffs that "education must 'provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process.' " Nevertheless, the court declined to second-guess the legislature: "While an 'adequate' education must be designed to produce individuals who can function in society, it is primarily the legislative branch of government which must give content to the term 'adequate.' "[19]

In contrast to the cases discussed in the last paragraph, a number of state courts have been willing to tackle the issue of what constitutes an adequate education under the state constitution. The West Virginia Supreme Court interpreted its constitution's call for a "thorough and efficient" system of education as requiring every school to develop "the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and to do so economically." The court expanded its ruling by listing the subjects and skills all children should receive including arithmetic, social ethics, and recreation.[20]

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[17] R.E.F.I.T. v. Cuomo, 655 N.E.2d 647 (N.Y. 1995); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).

[18] Danson v. Casey, 399 A.2d 360 (Pa. 1979).

[19] McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).

In striking down its state finance plan, the Supreme Court of Washington took a different approach to defining the concept of a legally adequate education. It suggested several ways for determining whether the educational program of the state met the state constitution's requirement for "ample provision." Ample provision could be measured in terms of the state board of education accreditation standards, or the adequacy of programs could be determined in terms of the "statewide aggregate per pupil deployment of certified and classified staff and nonsalary related costs for the maintenance and operation of a school program for the normal range of student." In other words, something close to the average level of educational services that school districts have chosen to provide is defined as adequate or ample. This measure was termed the "collective wisdom" criterion.[21]

A Kansas court reasoned that the state constitutional requirement that the legislature provide a "suitable" system of education requires an equitable distribution of educational funds. The mandate is not for equitable treatment of school districts such as by a system of power equalization, but to offer each Kansas child an "equal educational opportunity." This does not mean that the same amount of money needs to be spent on each child's education, but rather that any disparity in educational funding be justified by a "rational educational explanation." Although not questioning the adequacy of the current system, the court noted that if current levels of funding were reduced, the system might become inadequate. Thus, the Kansas court found that both equity and adequacy are necessary conditions of a suitable system of education.[22]

In the following excerpt from a very long opinion, the Kentucky Supreme Court provided a detailed analysis of the meaning of the state constitutional mandate to "provide an efficient system of common schools throughout the state." The analysis deals with issues of both equity and adequacy.

* * *

ROSE v. COUNCIL FOR BETTER EDUCATION, INC.

Supreme Court of Kentucky, 1989
790 S.W.2d 186

STEPHENS, Chief Justice.

The issue we decide on this appeal is whether the Kentucky General Assembly has complied with its constitutional mandate to "provide an efficient system of common schools throughout the State" [Kentucky Constitution, Section 183].

In deciding that it has not, we intend no criticism of the substantial efforts made by the present General Assembly and by its predecessors, nor do we intend to substitute our judicial authority for the authority and discretion of the General Assembly. We are, rather, exercising our constitutional duty in declaring that, when we consider the evidence in the record, and when we apply the constitutional requirement of Section 183 to that evidence, it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an "efficient" one in our view of the clear mandate of Section 183. The common school system in Kentucky is constitutionally deficient.

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[20] Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).

[21] Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc).

[22] Mock v. Kansas, Case No. 91-CV-1009 (Shawnee Cty. Dist. Ct. Kan. 1991).

In reaching this decision, we are ever mindful of the immeasurable worth of education to our state and its citizens, especially to its young people. The framers of our constitution intended that each and every child in this state should receive a proper and an adequate education, *to be provided for by the General Assembly*. This opinion dutifully applies the constitutional test of Section 183 to the existing system of common schools. We do no more, nor may we do any less.

The goal of the framers of our constitution, and the polestar of this opinion, is eloquently and movingly stated in the landmark case of *Brown v. Board of Education*:

"*education is perhaps the most important function of state and local governments*. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms*."

These thoughts were as applicable in 1891 when Section 183 was adopted as they are today and the goals they express reflect the goals set out by the framers of our Kentucky Constitution. . . .

The complaint included allegations that the system of school financing provided for by the General Assembly is inadequate; places too much emphasis on local school board resources; and results in inadequacies, inequities and inequalities throughout the state so as to result in an inefficient system of common school education in violation of Kentucky Constitution, Sections 1, 3 and 183 and the equal protection clause and the due process of law clause of the 14th Amendment to the United States Constitution. Additionally the complaint maintains the entire system is not efficient under the mandate of Section 183. . . .

The trial court . . . found Kentucky's common school finance system to be unconstitutional and discriminatory and held that the General Assembly had not produced an efficient system of common schools throughout the state. . . .

[The opinion next summarizes the history and current system of educational finance in Kentucky including its two primary mechanisms of state aid to local districts—a Minimum Foundation Program (MFP) and a Power Equalization Program (PEP). The MFP provided some aid to any district that met certain financial and educational standards. The PEP was designed to augment the taxing power of the property-poor districts but in practice had very little effect.]

THE EVIDENCE

As we proceed to summarize the evidence before us, the legal test we must apply is whether that evidence supports the conclusion of the trial court that the Kentucky system of common schools is not efficient. . . .

The evidence in this case consists of numerous depositions, volumes of oral evidence heard by the trial court, and a seemingly endless amount of statistical data, reports, etc. We will not unduly lengthen this opinion with an extensive discussion of that evidence. As a matter of fact, such is really not necessary. The overall effect of appellants' evidence is a virtual concession that Kentucky's system of common schools is underfunded and inadequate; is fraught with inequalities and inequities throughout the 177 local school districts; is ranked nationally in the lower 20–25% in virtually every category that is used to evaluate educational performance; and is not uniform among the districts in educational opportunities. When one considers the evidence presented by the appellants, there is little or no evidence to even begin to negate that of the appellees. The tidal wave of the appellees' evidence literally engulfs that of the appellants.

In spite of the Minimum Foundation Program and the Power Equalization Program, there are wide variations in financial resources and dispositions thereof which result in unequal educational opportunities throughout Kentucky. The local districts have large variances in taxable property per student. Even a total elimination of all mismanagement and waste in local school districts would not correct the situation as it now exists. A substantial difference in the curricula offered in the poorer districts contrasts with that of the richer districts, particularly in the areas of foreign language, science, mathematics, music and art.

The achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district. Student-teacher ratios are higher in the poorer districts. Moreover, although Kentucky's per capita income is low, it makes an even lower per capita effort to support the common schools.

Students in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts.

That Kentucky's overall effort and resulting achievement in the area of primary and secondary education are comparatively low, nationally, is not in dispute. Thirty-five percent of our adult population are high school drop-outs. Eighty percent of Kentucky's local school districts are identified as being "poor," in terms of taxable property. The other twenty percent are under the national average. Thirty percent of our local school districts are "functionally bankrupt."

Evidence relative to educational performance was introduced by appellees to make a comparison of Kentucky with its neighbors—Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, and West Virginia. It also ranked Kentucky, nationally in the same areas.

In the area of per pupil expenditures, Kentucky ranks 6th among the 8 states and ranks 40th, nationally. With respect to the average annual salary of instructional staff, Kentucky again ranks 6th among its neighbors and 37th nationally. In the area of classroom teacher compensation, Kentucky is 7th and 37th. Our classroom teacher average salary is 84.68% of the national average and our per pupil expenditure is 78.20% of the national average.

When one considers the use of property taxes as a percent of sources of school revenue, Kentucky is 7th among our neighboring states and 43rd nationally. The national average is 30.1% while Kentucky's rate is 18.2%. If any more evidence is needed to show the inadequacy of our overall effort, consider that only 68.2% of ninth grade students eventually graduate from high school in Kentucky. That ranks us 7th among our eight adjacent sister states. Among the 6 of our neighboring states that use the ACT scholastic achievement test, our high school graduates average score is 18.1; which ranks us 4th. Kentucky's ratio of pupil-teacher is 19.2, which ranks us 7th in this region. In spite of the appellants' claim, at both the trial level and on appeal, that appellees' statistics are not current, all the above figures are based on a 1986 study, which was published in 1987.

Numerous well-qualified educators and school administrators testified before the trial court and all described Kentucky's educational effort as being inadequate and well below the national effort.

With this background of Kentucky's overall effort with regard to education and its comparison to other states in the area, and nationally, we proceed to examine the trial court's finding relative to inequity and lack of uniformity in the overabundance of local school districts. We will discuss the educational opportunities offered and then address the disparity in financial effort and support.

EDUCATIONAL EFFORT

The numerous witnesses that testified before the trial court are recognized experts in the field of primary and secondary education. They have advanced college degrees, they have taught school, they have been school administrators, they have been participants at a local or state level in Kentucky's education system, and they have performed in-depth studies of Kentucky's system. Without exception, they testified that there is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay; provision of basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of school physical plants; and per year expenditure per student. Kentucky's children, simply because of their place of residence, are offered a virtual hodgepodge of educational opportunities. The quality of education in the poorer local school districts is substantially less in most, if not all, of the above categories.

Can anyone seriously argue that these disparities do not affect the basic educational opportunities of those children in the poorer districts? To ask the question is to answer it. Children in 80% of local school districts in this Commonwealth are not as well-educated as those in the other 20%.

Moreover, most of the witnesses before the trial court testified that not only were the state's educational opportunities unequal and lacking in uniformity, but that *all* were inadequate. Testimony indicated that not only do the so-called poorer districts provide inadequate education to fulfill the needs of the students but the more affluent districts' efforts are inadequate as well, as judged by accepted national standards.

As stated, when one reads the record, and when one considers the argument of counsel for the appellants, one can find no proof, no statement that contradicts the evidence about the existing inequalities and lack of uniformity in the overall performance of Kentucky's system of common schools.

Summarizing appellants' argument, and without intending to give it short shrift, it is contended that over the years the General Assembly has continually enacted such programs as the MFP, the PEP, and other progressive programs during recent sessions of the General Assembly. Moreover, uncontroverted evidence is adduced to show that the overall amount of money appropriated for local schools has increased by a substantial amount. The argument seems to be to the effect that "we have done our best." However, it is significant that *all* the experts were keenly aware of the legislative history, including substantive legislation and increased funding and yet, all of them stated that inequalities still exist, and indeed have been exacerbated by some of the legislation. Appellants conceded, the trial court found and we concur that in spite of legislative efforts, the total local and state effort in education in Kentucky's primary and secondary education is inadequate and is lacking in uniformity. It is discriminatory as to the children served in 80% of our local school districts.

FINANCIAL EFFORT

Uniform testimony of the expert witnesses at trial, corroborated by data, showed a definite correlation between the money spent per child on education and the quality of the education received. As we have previously stated in our discussion of the history of Kentucky's school finances, our system does not *require* a minimum local effort. The MFP, being based on average daily attendance, certainly infuses more money into each local district, but is not designed to correct problems of inequality and lack of uniformity between local school districts. The experts stated that the PEP, although a good idea, was and is underfunded.

The disparity in per pupil expenditure by the local school boards runs in the thousands of dollars per year. Moreover, between the extreme high allocation and the extreme low allocation lies a wide range of annual per pupil expenditures. In theory (and perhaps in actual practice) there could be 177 different per pupil expenditures, thus leading to 177 different educational efforts. The financing effort of local school districts is, figuratively speaking, a jigsaw puzzle.

It is argued by the appellants that the so-called permissive taxes, are at least part of the solution to equalizing local financial efforts. There are two easy answers that dispose of this argument. First, the taxes are permissive. Responding to obvious voter resistance to the imposition of taxes, 89 districts have enacted the tax on gross utility receipts; 5 districts have enacted the occupational tax; 82 districts have also enacted a special building tax, normally for a specific project for one time only, and not affecting teacher pay, instructional equipment, or any of the specific needs of educational opportunity. As the nature of the taxes is permissive, in many districts they are not adopted and therefore do not produce one cent in additional local revenue.

Secondly, according to the testimony of the expert witnesses, even if all the permissive taxes were enacted, the financial effort would still be inadequate, and because the population of the districts is in direct proportion to the amount of money that could and is raised by these taxes, the overall problem of an unequal local effort would be exacerbated by such action. Clearly, the permissive taxes are not the solution to the problems. Rather, they contribute to the disparity of per pupil expenditures.

Additionally, because the assessable and taxable real and personal property in the 177 districts is so varied, and because of a lack of uniformity in tax rates, the local school boards' tax effort is not only lacking in uniformity but is also lacking in adequate effort. The history of school financing in Kentucky, certainly corroborates the trial court's finding as to the lack of uniformity and the lack of adequacy of local and state funding of education in the state. Based on the record before us, it is beyond cavil that the trial court's finding was correct. . . .

OPINIONS OF EXPERTS

Numerous well-qualified experts testified in this case. They were all well educated, experienced teachers, educators, or administrators; and all were familiar with the Kentucky system of common schools and with other states' and national school issues.

Dr. Richard Salmon testified that the concept of efficiency was a three part concept. First, the system should impose no financial hardship or advantage on any group of citizens. Further, local school districts must make comparable tax efforts. Second, resources provided by the system must be adequate and uniform throughout the state. Third, the system must not waste resources.

Dr. Kern Alexander opined that an efficient system is one which is unitary. It is one in which there is uniformity throughout the state. It is one in which equality is a hallmark and one in which students must be given equal educational opportunities, regardless of economic status, or place of residence. He also testified that "efficient" involves pay and training of teachers, school buildings, other teaching staff, materials, and adequacy of all educational resources. Moreover, he, like Dr. Salmon, believed that "efficient" also applies to the quality of management of schools. Summarizing Dr. Alexander's opinion, an efficient system is unitary, uniform, adequate and properly managed.

The definitions of "efficient" were documented and supported by numerous national and local studies, prepared and authorized by many of the giants of the education profession.

The primary expert for the appellees was a local school superintendent who felt that an efficient system is one which is operated as best as can be with the money that was provided. We reject such a definition which could result in a system of common schools, efficient only in the uniformly deplorable conditions it provides throughout the state.

In summary the experts in this case believed that an "efficient" system of common schools should have several elements:

1) The system is the sole responsibility of the General Assembly.
2) The tax effort should be evenly spread.
3) The system must provide the necessary resources throughout the state—they must be uniform.
4) The system must provide an adequate education.
5) The system must be properly managed.

DEFINITION OF "EFFICIENT"

We now hone in on the heart of this litigation. In defining "efficient," we use all the tools that are made available to us. In spite of any protestations to the contrary, we do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the Constitution, and, armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty.

Any system of common schools must be created and maintained with the premise that education is absolutely vital to the present and to the future of our Commonwealth. As Herbert Spencer observed, "Education has for its object the formation of character." . . . No tax proceeds have a more important position or purpose than those for education in the grand scheme of our government. The importance of common schools and the education they provide Kentucky's children cannot be overemphasized or overstated.

The sole responsibility for providing the system of common schools is that of our General Assembly. It is a duty—it is a constitutional mandate placed by the people on the 138 members of that body who represent those selfsame people.

The General Assembly must not only establish the system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional manner. The General Assembly must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level.

The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts.

As we have indicated, Section 183 requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education. In no way does this constitutional requirement act as a limitation on the General Assembly's power to create local school entities and to grant to those entities the authority to supplement the state system. Therefore, if the General Assembly decides to establish local school entities, it may also empower them to enact local revenue initiatives to supplement the uniform, equal educational effort that the General Assembly must provide. This includes not only revenue measures similar to the special taxes previously discussed, but also the power to assess local ad valorem taxes on real property and personal property at a rate over and above that set by the General Assembly to fund the statewide system of common schools. Such local efforts may not be used by the General Assembly as a substitute for providing an adequate, equal and substantially uniform educational system throughout this state.

Having declared the system of common schools to be constitutionally deficient, we have directed the General Assembly to recreate and redesign a new system that will comply with the standards we have set out. Such system will guarantee to all children the opportunity for an adequate education, through a *state* system. To allow local citizens and taxpayers to make a supplementary effort in no way reduces or negates the minimum quality of education required in the statewide system.

We do not instruct the General Assembly to enact any specific legislation. We do not direct the members of the General Assembly to raise taxes. It is their decision how best to achieve efficiency. We only decide the nature of the constitutional mandate. We only determine the intent of the framers. Carrying-out that intent is the duty of the General Assembly.

A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right. We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.*

The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
2) Common schools shall be free to all.
3) Common schools shall be available to all Kentucky children.
4) Common schools shall be substantially uniform throughout the state.
5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

. . .

SUMMARY/CONCLUSION

. . .

We have decided one legal issue—and one legal issue only—viz., that the General Assembly of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth.

Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school

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*In recreating and redesigning the Kentucky system of common schools, these seven characteristics should be considered as *minimum* goals in providing an adequate education. Certainly, there is no prohibition against higher goals—whether such are implemented statewide by the General Assembly or through the efforts of any local education entities that the General Assembly may establish—so long as the General Assembly meets the standards set out in this Opinion.

boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.

While individual statutes are not herein addressed specifically or considered and declared to be facially unconstitutional, the statutory system as a whole and the interrelationship of the parts therein are hereby declared to be in violation of Section 183 of the Kentucky Constitution. Just as the bricks and mortar used in the construction of a schoolhouse, while contributing to the building's facade, do not ensure the overall structural adequacy of the schoolhouse, particular statutes drafted by the legislature in crafting and designing the current school system are not unconstitutional in and of themselves. Like the crumbling schoolhouse which must be redesigned and revitalized for more efficient use, with some component parts found to be adequate, some found to be less than adequate, statutes relating to education may be reenacted as components of a constitutional system if they combine with other component statutes to form an efficient and thereby constitutional system. . . .

* * *

Rose amounts to a judicial order to the Kentucky legislature to devise and fund a system of education that is both equitable and adequate. The legislature has responded not only by significantly changing the way education is funded in Kentucky, but also by instituting reforms designed to improve student outcomes. Some of these changes have been controversial.[23]

Courts in a number of other states have also been influenced by *Rose*. The highest courts in both New Hampshire and Massachusetts have embraced the seven outcome goals listed in *Rose* as constitutionally mandated in their states as well.[24] The Massachusetts court further declared that the legislature's "duty to educate . . . will evolve together with our society. Our Constitution, and its education clause, must be interpreted in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning." The implication of this statement is that the court will be open to continued reevaluation of the adequacy of the state's system of education. By contrast, the highest court in Rhode Island rejected the notion that the constitutional adequacy of educational funding could be determined by student outcomes. "We are particularly troubled," wrote the court, "by a definition of 'equity' that requires 'a sufficient amount of money . . . to achieve learner outcomes.' As observed by the United States Supreme Court . . . 'numerous external factors beyond the control of the [school district] and the State affect . . . student achievement.' "[25]

Whether three decades of educational finance litigation has resulted in greater equity or an overall improvement in educational quality is undecided. Given the complexity of producing and assessing educational equity and quality, the results of educational finance litigation in individual states and overall may always remain uncertain. In all likelihood, some states have fared better than others. Kentucky seems to have made a promising start toward improving what historically, by the Kentucky Supreme Court's own admission, was one of the nation's weaker school systems. By contrast, one need only look at the convoluted history of educational finance litigation in New Jersey to see that finance reform litigation can become a quagmire. Judicial involvement began in 1972 and continues to this day despite more than a dozen decisions concerning not only broad issues like the basic system of finance, the special needs of urban districts, and the curriculum, but also narrower ones like per pupil square footage quotas and the provision of summer school.[26] Whether all this judicial activity has produced desirable outcomes is a matter of continuing debate.

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[23] *See*, Board of Educ. v. Bushee, 889 S.W.2d 809 (Ky. 1994).

[24] Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).

[25] City of Pawtucket v. Sundlun, 662 A.2d 40 (1995).

The outcome of state education finance cases, whether based on state constitutional equal protection clauses or education articles, seems to depend as much on the philosophy of the state high court as on the specifics of the finance system and the constitutional provision under examination.

Nevertheless, an increasing number of state courts are embracing the doctrines:

- that state constitutions place the responsibility for provision of education directly on the state legislature,
- that the legislature is responsible for funding all the state's public schools,
- that if a state constitution mandates a "thorough and efficient" or "suitable" system of education, it means that the education provided by the state must be equitably distributed and at least minimally adequate,
- that even in the absence of such language, an education article may be interpreted to require equitable and adequate provision of education to all children within the jurisdiction of the state,
- that the legislature cannot discharge its educational responsibilities simply by creating local school boards with the power to raise money at varying levels based on local wealth and desires, and
- that it is the role of state courts to ensure that the legislature lives up to its constitutional responsibilities for the provision of education.

8.4 LOCAL SCHOOL BOARD AUTHORITY TO RAISE AND SPEND MONEY

School boards have no inherent constitutional authority to tax, borrow, and spend. The authority to tax must be expressly granted and cannot be inferred from general grants of authority to operate schools.[27] Money earmarked by law for specific purposes cannot be spent for any other purpose.[28] State laws and state constitutional provisions sometimes limit year-to-year increases in local taxes and cap the total amount of money that may be raised and borrowed. School authority to tax and spend is also circumscribed by federal and state constitutional limitations that prohibit the establishment of religion, and by state constitutional provisions that limit expenditures to "public" purposes.

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[26] Abbott v. Burke, 710 A.2d 450 (N.J. 1998) (the most recent decision, which includes a brief history of the approximately thirty years of litigation).

[27] Manges v. Freer Indep. Sch. Dist., 653 S.W.2d 533 (Tex. App. 1983), *rev'd on other grounds*, 677 S.W.2d 488 (Tex. 1984).

[28] Barth v. Board of Educ., 322 N.W.2d 694 (Wis. Ct. App. 1982).

A mostly older, but still valid body of case law explored the limitations on school boards' authority to spend. The general rule is that school boards may only spend money to operate schools and for related educational purposes unless specifically authorized by the legislature to perform other functions. Expenditures not specifically authorized by law are permitted if reasonably implied by the authority granted to the school board by the legislature or if necessary to carry out the school board's educational mandate. Three early-twentieth century cases in Washington state challenging the authority of school boards to build and operate playgrounds, gymnasiums, and medical clinics illustrate these principles.[29] These cases were decided before organized physical activities and sports became a standard or required part of the curriculum in most states. Nevertheless, the courts found that expenditures for playgrounds and gymnasiums were permitted. The court in the medical clinic case explained why:

> Playgrounds in connection with public schools have for generations been so common that it must be presumed that the legislature, by giving the general power to maintain public schools, incidentally intended to also give the authority to provide such playgrounds in connection therewith; and while gymnasiums in connection with public schools have not been so common, the work and exercise of the students carried on therein is manifestly so intimately connected with the education of the pupil as to warrant the assumption that the legislature intended the school districts and their officers to possess the power providing the same as a proper public school equipment.

However, the same reasoning did not apply to medical clinics:

> The rendering of medical, surgical and dental services to the pupils, however, is, and always has been, we think, so foreign to the powers to be exercised by a school district or its officers that such power cannot be held to exist in the absence of express legislative language so providing.

School boards must formulate and manage their budgets in accordance with state law. Statutes may limit the board's budgetary authority such as by putting a cap on the annual percentage increase or by prohibiting the annual budget from exceeding the amount of money anticipated to be available from tax levies and state aid.[30] In some states, local school boards must submit their budgets either to the voters or to a higher government authority for approval. In New York, if the voters fail to approve the proposed budget, the board must adopt an austerity budget that covers only teacher salaries and "ordinary contingent expenses."[31] In California, if a local district's proposed budget fails to win approval from the county and state, the county superintendent has authority to adopt a budget for the district and to control the district's expenditures to keep them within that budget.[32]

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[29] State *ex rel.* Sch. Dist. No. 56 v. Superior Court, 124 P. 484 (Wash. 1912) (playground); Sorenson v. Perkins & Co., 129 P. 577 (Wash. 1913) (gymnasium); McGilvra v. Seattle Sch. Dist. No. 1, 194 P. 817 (Wash. 1921) (medical clinic).

[30] Marsh v. Erhard, 47 A.2d 713 (Pa. 1946).

[31] N.Y. Educ. Law §2023.

State statutes place specific requirements and limitations on local school board procedures for dealing with financial exigency. Most states authorize districts wishing to initiate large scale building or remodeling projects to finance them with bonds. Procedures for issuing bonds are often quite specific and may include limits on indebtedness and a requirement of local voter approval. Most states also authorize school boards to secure short-term loans when cash on hand is temporarily insufficient to cover expenses. Statutes may specify procedures for securing short-term loans and impose limitations such as maximum terms, rates of interest, and levels of indebtedness. Some states permit districts to maintain a "contingency fund" to deal with unexpected needs for cash. Some states also permit school boards to deal with unexpected needs by shifting funds from one category of expense to another[33] or to increase their budgets in the middle of a school year to deal with necessary expenses that could not reasonably have been foreseen at the time the budget was adopted.[34] School districts wishing to sell or lease unneeded school facilities must also comply with the requirements of state law.[35] School districts sometimes wish to impose fees for admission to the school or to a particular class, for books and other supplies, for specific services, or for participation in extracurricular activities. The judicial opinions concerning the legality of school fees deal mostly with two issues: Is the fee consistent with the state constitution's guarantee of a free education and does the fee discriminate against the poor. The resolution of these issues depends on the precise language of the state constitution, the court's concept of education and what services are essential, and the court's notion of equity.

Because all state constitutions guarantee a free education or an education free of tuition, no cases permit public schools to charge district residents for access to the basic program during the regular school year. However, some rulings permit tuition for summer school[36] and for students defined by law as nonresidents of the district.[37] Courts are split on the question of fees for nonrequired courses: Some allow course fees, some forbid them, and some allow them unless the course can be used for credit toward graduation.[38]

Courts are also split on the question of whether fees may be charged for the use of textbooks. Some courts permit the fee provided it is waived for poor children.[39] In general, textbook fees are allowed in states where the constitution requires a system of education "free of" or "without tuition" but prohibited where the constitution mandates "free public schools."[40]

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[32] Cal. Ed. Code §42127.3(b)(l).

[33] Isley v. Sch. Dist. No. 2, 305 P.2d 432 (Ariz. 1956).

[34] Raffone v. Pearsall, 333 N.Y.S.2d 316 (App. Div. 1972).

[35] Madachy v. Huntington Horse Show Ass'n, 119 W. Va. 54,192 S.E. 128 (W.Va. 1937).

[36] Washington v. Salisbury, 306 S.E.2d 600 (S.C. 1983).

[37] Oracle Sch. Dist. No. 2 v. Mammoth High Sch. Dist. No. 88, 633 P.2d 450 (Ariz. Ct. App. 1981).

[38] Concerned Parents v. Caruthersville Sch. Dist. 18, 548 S.W.2d 554 (Mo. 1977) (en banc); Norton v. Board of Educ., 553 P.2d 1277 (N.M. 1976).

[39] Vandevender v. Cassell, 208 S.E.2d 436 (W.Va. 1974).

[40] Cardiff v. Bismarck Pub. Sch. Dist., 263 N.W.2d 105 (N.D. 1978); Sneed v. Greenboro City Bd. of Educ., 264 S.E.2d 106 (N.C. 1980).

A majority of courts have upheld reasonable fees for school supplies or activities.[41] In some cases, the acceptability of fees depends on whether the activity is required or closely related to the school's educational goals. The Supreme Court of Montana stated this principle as follows:

> Is a given course or activity reasonably related to a recognized academic and educational goal of the particular school system? If it is, it constitutes part of the free, public school system commanded by . . . the Montana Constitution and additional fees or charges cannot be levied, directly or indirectly, against the student or his parents. If it is not, reasonable fees or charges may be imposed.[42]

When money is tight, school districts may resort to cost-cutting measures such as deferred building maintenance or reduction in staff size. In addition to its educational consequences, deferred maintenance may have legal consequences if poorly maintained buildings pose a danger to health and safety (see sec. 12.6). Personnel may not be reduced beyond the level needed to satisfy legal mandates (e.g., state statutes specifying maximum class size and federal and state laws mandating services to disabled students). In addition, any reduction in certified personnel necessitated by financial exigency must comply with statutory and contractual mandates concerning reduction-in-force (see sec. 10.6) and constitutional and statutory antidiscrimination laws (see sec. 9.4).

In a few cases, school boards have decided to bring the school year to a premature conclusion because the school district ran out of funds. However, in *Butt v. State*, the California Supreme Court refused on equal protection grounds to permit a school district that ran out of money to close it doors six weeks ahead of schedule. Finding that the early closing would "cause an extreme and unprecedented disparity in educational service and progress" to the districts' pupils, the court ruled that the state was obliged to loan the school district the money necessary to allow the schools to remain open until the scheduled end of the year.[43] If a school district runs out of money as a result of school board mismanagement, the board may be subject to removal from office by methods established in state law.[44] Some states' statutes also provide for state take-over of school districts whose funds are mismanaged by the local school board.[45]

8.5 SUMMARY

All levels of government play a part in funding public education. Although not obliged by the Constitution, Congress has chosen to provide a modest level of funding to public schools. Most federal aid is in the form of categorical aid or block grants and is given on condition that certain programs be offered, certain procedures followed, and that there be no discrimination against specified groups.

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[41] Hamer v. Board of Educ., 367 N.E.2d 739 (Ill. App. Ct. 1977).

[42] Granger v. Cascade County Sch. Dist. No. 1, 499 P.2d 780 (Mont. 1972).

[43] 842 P.2d 1240 (Cal. 1992).

[44] Tautenhahn v. State, 334 S.W.2d 574 (Tex. App. 1960).

[45] N.J. Stat. Ann. §18A:7A-10 *et seq.*

In accordance with the mandates of their own constitutions, state legislatures are responsible for ensuring an adequate level of funding to the state's public schools. With some variation, legislatures have chosen to finance public schools by delegating to local school boards the authority to tax real property within their districts and supplementing local revenue with state funds allocated according to a complex formula. Depending on state and locality, school district funds may be further enhanced by direct transfers of funds from municipal or county governments as authorized and required by the state legislature.

This multifaceted, complex system has engendered a great variety of litigation. Much of this litigation, especially in the early years of public schooling, involved general issues of taxation and spending authority. It is now well settled that Congress has the authority to use tax money to aid schools, that state legislatures have the power to tax on behalf of schools, and that school boards have only as much taxing and spending authority as specifically delegated to them by the state legislature.

The primary focus of most significant recent litigation in the area of educational finance and of this chapter is issues involving questions of equity and adequacy in education. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court ruled that state systems of educational finance that result in significantly different levels of per pupil expenditures across districts do not violate the Equal Protection Clause. However, this ruling suggests and subsequent cases confirm that total denial of education to any child within the state's jurisdiction is unconstitutional.

Suits have also been brought in the courts of more than three quarters of the states attacking the constitutionality of state educational finance systems. These suits have objected to interdistrict funding inequities or to the alleged inadequacy of the educational program offered in some or all of the state's schools. The suits have been based on the equal protection clause of the state constitution or the education article of the state constitution. Regardless of their specific claims, these lawsuits have produced mixed results. Some state courts have ratified school funding plans despite wide disparities in school districts' power to raise money and in per pupil expenditures across districts and others have sought to equalize these financial indicators. Still other state courts have interpreted their state constitutions as requiring the state legislature to provide to every child in the state an educational opportunity that is both adequate and equivalent to the opportunity provided to other children. Some courts have even offered a detailed analysis of what constitutes an adequate education.

CHAPTER 9

FEDERAL CONSTITUTIONAL AND STATUTORY RIGHTS OF SCHOOL EMPLOYEES

Now begins a series of three chapters discussing the legal framework of the relationship between schools and their employees. The law concerning the school's treatment of its employees emanates from many sources—state and federal statutes, state and federal constitutional provisions, and the common law. For example, the dismissal of a tenured teacher must be for reasons specified in state law and follow procedures required by state law, the teacher's contract, the collective bargaining agreement, and the Constitution's Due Process Clause. The dismissal may not violate the free speech or other constitutional rights of the teacher or federal or state statutes prohibiting various forms of discrimination in employment. This chapter examines the federal constitutional and statutory rights of teachers and other employees. Chapter 10 deals with employment and personnel issues like hiring, evaluation, and dismissal. Chapter 11 looks at collective bargaining, contracts, and the role of professional unions.

Recall that the Constitution places limitations on the power of government to control the behavior of individuals. There are certain behaviors that under normal circumstances government may not regulate and certain laws that it cannot make. Viewed from the perspective of the individual, these limitations are the civil rights and liberties enjoyed by every member of society. School officials, as representatives of the government, are bound to respect these rights in their dealings not only with students but also with their subordinate employees.

However, as with students, there are times when the special circumstances of the school necessitate a balancing between the constitutional rights of employees and the promotion of important educational goals. In addition, the legal power of the government over its employees is greater than over ordinary citizens. Thus, there are circumstances when the school board may impose requirements and restrictions on its employees that government in general could not impose on the citizenry. At times, however, the school must accommodate its program to the constitutional rights of its employees.

This chapter examines these issues with regard to the constitutional provisions that have engendered the most conflict and litigation in education: freedom of speech, freedom of religion, the right to privacy, the Fourth Amendment's protection against unreasonable search and seizure, and the Fourteenth Amendment's guarantee of equal protection of the law. The discussion assumes knowledge of the constitutional principles and doctrines presented in earlier chapters.

In addition to the Constitution, a significant body of federal statutes regulates the employment practices of public schools. These statutes supplement and expand the requirements of the Equal Protection Clause by prohibiting discrimination in employment on the basis of race, ethnicity, gender, religion, disability, or age. Sections 9.4 to 9.7 examine the application of federal antidiscrimination statutes to employment practices in public education.

9.1 POLITICAL ACTIVITY AND NONCURRICULAR SPEECH

May school boards insist that employees embrace the board's political and educational views? Must school employees be permitted to publicly oppose the policies or to directly criticize the members of the school board that employs them? Must teachers be permitted to reveal or advocate their political or personal beliefs to a captive audience of students? Does not the school have the right to inculcate society's chosen values by controlling the speech of its teachers? Do not public school officials have the right and perhaps the duty to protect their pupils from viewpoints they consider undesirable or dangerous? To answer these questions, courts have had to strike a balance between educators' freedom of speech and the school's right to promote its educational goals. As with students, the balance depends in part on whether the speech occurs in school or out and whether the speech is part of the school's curriculum. This section deals with school employee speech that occurs outside the context of the school curriculum. The next section deals with curricular speech by teachers and other school employees.

Public school teachers have always occupied a sensitive and a visible role in the community. In the public schools of colonial New England, people could not be teachers unless the town minister certified their religious and moral rectitude. Although states no longer impose a religious qualification on teachers, they have in more recent times employed ideological tests. Practices designed to enforce these qualifications have included political background checks, disqualification of members of political groups considered dangerous or subversive, and required loyalty oaths.

In keeping with the strong anticommunist sentiments of the time, the Supreme Court during the 1950s generally found these practices a constitutionally permissible way of protecting the government service from subversives. For example, in *Adler v. Board of Education of New York*,[1] the Supreme Court upheld a New York law disqualifying from employment in civil service or public schools any person who "advocates, advises or teaches" governmental overthrow by force or violence or who organizes or joins any group advocating such doctrine.

With the coming of the new decade, the Supreme Court changed its view of the constitutionality of these security measures. In 1960, in *Shelton v. Tucker*,[2] the Court prohibited school boards from requiring teachers to disclose all their associational ties and memberships. In 1964, in *Baggett v. Bullitt*,[3] the Court forbade the use of vaguely worded loyalty oaths.

Then, in 1967, in *Keyishian v. Board of Regents*,[4] the Court took a major step toward protecting the political rights of teachers by prohibiting states and school boards from dismissing teachers for membership in disfavored organizations, even those with violent or unlawful goals such as the Communist party. Such dismissals, reasoned the Court, would violate the teachers' right to freedom of association, a corollary of free speech (see sec. 4.5). It would be permissible to fire a teacher for "specific intent to further the unlawful aims of an organization" but not for "mere membership" or even knowledge of the organization's unlawful goals.

However, as much as *Keyishian*, *Baggett* and *Shelton* stand against attempts to impose ideological qualifications on teachers, the Supreme Court continues to allow states or school boards to require an "affirmative oath," a pledge, for example, to uphold and defend the Constitution or oppose the overthrow of the government by illegal means.[5] (Negative oaths, for example, "I have never been a member of a subversive organization," are impermissible.) The Court has also upheld against a challenge based on the Equal Protection Clause a state policy denying teacher certification to aliens who were eligible but refused to apply for U.S. citizenship.[6] Thus, although no one may be excluded from teaching solely because of membership in a disfavored political organization, even one that advocates violent overthrow of the government, the Constitution permits requiring teachers to take a specifically worded positive loyalty oath or to hold or seek citizenship.

On a related issue, the Supreme Court has made it clear that public employees generally may not be dismissed, punished, or rewarded solely because of their party affiliation or political beliefs. Thus, the Court has sought an end to the traditional practice of political patronage, which in schools often meant the replacement of administrators and even teachers after municipal or school board elections. The major exception to this limitation is with regard to those positions for which "party affiliation is an appropriate requirement for the effective performance of the public office involved."[7] Based on these principles teachers have been protected from dismissal because they either supported the recall or opposed the reelection of incumbent school board members.[8] One court ruled that the refusal to hire teachers for summer employment because they supported the losing candidates for school board was impermissible.[9] It is, however, arguably permissible for a school board to replace top central office administrators whose politics on issues relating directly to the operation of the schools differ from the board's.

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[1] 342 U.S. 485 (1952).
[2] 364 U.S. 479 (1960).
[3] 377 U.S. 360 (1964).
[4] 385 U.S. 589 (1967).
[5] Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higgenbotham, 403 U.S. 207 (1971).
[6] Ambach v. Norwick, 441 U.S. 68 (1979).

In a recent case, *Castle v. Colonial School District*,[10] a federal district court prohibited enforcement of a school board policy prohibiting employees from engaging in political activities on school property at any time. The purpose of the policy was to prevent off-duty teachers from soliciting votes at polling places located in the schools. The board argued that the prohibition was needed to limit disruption and to protect voters from undue influence from teachers. But there was also evidence that board members were "annoyed about teachers advocating the election of rival board candidates." The court ruled in favor of the teachers, finding that the very essence of free speech was at stake; teachers had a right to criticize the current board and were in a unique position to provide the public with information regarding the quality of the schools.

Because of the great potential for conflict of interest, school employees may be prohibited from becoming school board members in the district in which they are employed;[11] however, they may not be prohibited from serving on the school board of another district or from running for or holding other public office.[12] Mandatory leaves of absence for school employees who seek or hold public office are also impermissible except, possibly, as part of a general requirement of leave of absence[13] for any similarly time-consuming outside employment or activity.

In a significant number of cases, a school has sought to punish teachers for expressing their personal opinions. Many of these cases concern a teacher's criticism of the school board's policies or programs or the performance of district administrators or other personnel. The school's rationale is usually that the communication may undermine public support for school officials and school policies or damage working relations within the school. The following case presents the Supreme Court's basic framework for deciding these cases.

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[7] Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

[8] Guerra v. Roma Indep. Sch. Dist., 444 F. Supp. 812 (S.D. Tex. 1977); Childers v. Independent Sch. Dist. No. 1, 676 F.2d 1338 (10th Cir. 1982).

[9] Solis v. Rio Grande City Indep. Sch., 734 F.2d 243 (5th Cir. 1984).

[10] 933 F. Supp. 458 (E.D. Pa. 1996).

[11] Haskins v. State *ex rel.* Harrington, 516 P.2d 1171 (Wyo. 1973). *See also*, Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

[12] Minielly v. State, 411 P.2d 69 (Or. 1966).

[13] Allen v. Board of Educ., 584 S.W.2d 408 (Ky. Ct. App. 1979).

PICKERING v. BOARD OF EDUCATION

Supreme Court of the United States, 1968
391 U.S. 563

Mr. Justice Marshall delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the relevant Illinois statute, that "interests of the school require[d] [his dismissal]."

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. . . . For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection. In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. . . . At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III.

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not" should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.*

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were *per se* harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were *per se* detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false) cannot reasonably be regarded as *per se* detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question, free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.**

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

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*It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

**There is likewise no occasion furnished by this case for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public.

IV.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. . . .

[W]e hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him,*** a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

[White dissented in part.]

***Because we conclude that appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.

* * *

Since *Pickering*, four Supreme Court cases have helped to further clarify the boundaries of protected speech for school and other public employees. In the first of these cases, *Givhan v. Western Line Consolidated School District*,[14] the Court held that speech need not be made in a public forum to be considered a matter of public concern. Thus, although a teacher's criticism of the school board's policies on racial issues was privately expressed to the principal, it still received the protection of the First Amendment.

The second and most significant of these cases, *Connick v. Myers*,[15] concerned an assistant district attorney, Myers, dismissed in part for circulating a questionnaire soliciting the support of her coworkers for her criticisms of the policies and practices of her superiors in the office. To decide the case, the Court, in accordance with *Pickering*, first had to determine whether the questionnaire dealt with matters of public concern or public importance. "Whether an employee's speech addresses a matter of public concern," declared the Court, "must be determined by the content, form, and context of a given statement . . ."

Analyzing the questionnaire, the Court concluded that most of the issues it raised were simply personal grievances. Most of the questions did not touch on ongoing issues already in the public realm. Nor did they attempt to inform the public directly of important issues or to bring to light wrongdoing or breaches of the public trust. In addition, Myers spoke out only in the context of her office and only after receiving an unwanted transfer notice, suggesting that her motivation was purely personal. The Court concluded that personal grievances expressed within the context of public employment do not qualify as matters of public concern: "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Thus, the Court concluded that the questions that reflected purely personal grievances did not receive First Amendment protection.

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[14] 439 U.S. 410 (1979).

[15] 461 U.S. 138 (1983).

However, in analyzing the questionnaire, the Court found one question that was not a purely personal grievance: The question asked if assistant district attorneys were ever pressured by superiors to work on political campaigns, thereby implicitly alleging wrongdoing on the part of high public officials. Because this allegation was a matter of public concern, it was necessary to determine whether it was permissible for this question to have contributed to Myers' dismissal. In making this determination, the Court sought to strike a balance between Myers' rights and the interest of her office "in promoting the efficiency of the public services it performs. . . ."

There is a limit, said the Court, to how much disruption need be tolerated by a public employer for the sake of freedom of speech. The limit must be determined on a case-by-case basis depending on such factors as the importance of the issue that was raised, the likelihood that the speech would result in disruption, and the degree and nature of disruption that actually occurred. Applying these criteria to Myers' actions, the Court found that the questionnaire addressed a matter of public concern only in "a most limited way," that the questionnaire was an act of insubordination that could and did cause a "mini-insurrection," and that the questionnaire damaged close working relations within the district attorney's office. Thus, the Court concluded that Myers' dismissal did not violate her right to freedom of speech.

In 1987, the Supreme Court provided further clarification of the *Pickering* and *Connick* doctrines. In *Rankin v. McPherson*,[16] the Court held that a clerical employee in a local constable's office could not be discharged for saying over the telephone, after hearing of the attempted assassination of President Reagan, "If they go for him again, I hope they get him." In finding that McPherson's remark dealt with a matter of public concern, the Court noted that the remark was made in the context of a conversation addressing the policies of the Reagan administration, and that the "inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." The Court went on to conclude that the actual and potential disruptive effect of the remark was minimal because McPherson did not serve in a confidential, policy-making, or public-contact role, nor was there any showing that McPherson's statement had interfered with the effective functioning of the constable's office or that it was made in a context that would bring discredit upon the office. The Court ruled that McPherson had engaged in "protected speech" and that her dismissal was impermissible.

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[16] 483 U.S. 378 (1987).

In 1994, in *Waters v. Churchill*,[17] the Supreme Court again used the *Pickering* and *Connick* doctrines to decide the case of a nurse at a public hospital dismissed after a private conversation at work with a trainee. The hospital claimed that the nurse's statements were personal grievances designed to prevent the trainee from working in a particular department of the hospital and to undermine the authority of the department's supervisor. The nurse claimed that her statements concerned the failure of her department to follow established procedures and thus were matters of public concern. In a plurality opinion, the Court ruled that the nurse's First Amendment rights had not been violated because the hospital had made a "reasonable, good-faith" effort to determine if the speech dealt with matters of public concern and had concluded that it did not. Even though a court might have found differently, "Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability." Furthermore, as stated in *Connick*, even speech addressing matters of public concern may be the basis of dismissal if the employer can make a substantial showing that the speech was likely to be disruptive. "Discouraging people from coming to work for a department," the Court noted, "certainly qualifies as disruption," as do negative comments that undermine the authority of a direct supervisor.

Applying these cases in the context of the public school requires careful analysis. In order to determine whether a school employee's noncurricular speech is protected, school officials must make a reasonable good-faith attempt to answer two questions. First, did the speech address a matter of public concern? If not, the speech is not protected and may constitutionally be the basis for disciplining the employee. However, if yes, then considering the content, form, and context of the speech, which was greater: the employee's interest in the speech or the actual or potential disruptive effect of the speech? If the former, then the speech is protected, but if the latter, then it is not.

Although there is no easy formula for answering the first question, the cases that have been decided so far indicate that courts will view comments on the following topics as matters of public concern: the school curriculum and program, the safety and physical well-being of students, issues raised in collective bargaining, alleged corruption by school or other public officials, and issues that are already the subject of widespread public discussion.[18] Also viewed as matters of public concern are any remarks made in a court trial or at a public hearing regarding issues placed on the agenda by a public agency.[19] However, the Seventh Circuit has ruled that speech regarding the effects of a school policy on an employee personally will not be viewed as addressing a matter of public concern. So, a teacher who discussed class size only in defense of criticism about her classroom performance was deemed not to have spoken on a matter of public concern.[20]

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[17] 511 U.S. 661 (1994).

[18] *See e.g.*, Morfin v. Albuquerque Pub. Sch., 906 F.2d 1434 (10th Cir. 1990); Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995); Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991).

[19] Piver v. Pender County Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987).

[20] Cliff v. Board of Sch. Comm'r of Indianapolis, 42 F.3d 403 (7th Cir. 1994).

Purely private communications on issues of no importance to the public may also not be protected. In one case, the court upheld the dismissal of a teacher who told some of her colleagues at work that she was bisexual and had a female lover, ruling that private communication of this kind was not protected speech.[21]

Regarding the second question, at least this much can be said: The more important the issue raised by the employee and the more significant the information supplied by the employee (i.e., the more valuable the speech), the more the courts seem willing to insist that some disruption be tolerated. However, the more vituperative and abusive the language used by the employee and the more personal the attack, the less disruption need be tolerated. Speech that urges colleagues to engage in unlawful disruptive activities such as illegal strikes is less likely to receive protection as is speech that discloses the content of confidential or private files or speech that contains significant errors or deliberate falsehoods. Even an honest statement of opinion can be disruptive enough to warrant dismissal as in the case of a teacher dismissed from a predominantly Black school after expressing hatred of Blacks.[22]

School officials may not seek to stifle open criticism of school policies by requiring that genuine issues of public concern be pursued exclusively through "channels."[23] Nor may regulations of employee speech be unconstitutionally vague or overbroad (see sec. 5.1), for example, prohibitions against "criticism" of colleagues or superiors.[24] School officials should also be aware that forty states have enacted whistleblower statutes that protect teachers and other public employees who in good faith report a violation of law, government waste, or specific dangers to public health and safety from adverse employment actions.[25]

Teachers claiming dismissal, demotion, transfer, or reprimand in violation of their free speech rights must first prove that they did in fact engage in protected speech according to the criteria established by the Supreme Court in *Pickering*, *Connick*, and other relevant cases. Plaintiffs must prove that the protected speech was a substantial factor in the board's decision to discipline. If a plaintiff succeeds in establishing these two points, the burden of proof then switches to the school to establish by preponderance of the evidence that the same decision would have been reached regardless of the teacher's speech. That is, school officials must establish that the administrative action occurred for some other reason, such as because of the teacher's incompetence. Thus, a teacher cannot be disciplined for engaging in protected speech, but a teacher cannot avoid discipline just by engaging in protected speech.[26] This points to the usefulness of an adequate set of contemporaneous records to accompany any adverse administrative action taken against a teacher or other employee.

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[21] Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

[22] Anderson v. Evans, 660 F.2d 153 (6th Cir. 1981).

[23] Brocknell v. Norton, 732 F.2d 664 (8th Cir. 1984).

[24] Westbrook v. Teton County Sch. Dist. No. 1, 918 F. Supp. 1475 (D. Wyo. 1996).

[25] Tim Barnett, *Overview of State Whistleblower Protection Statutes*, 43 Lab. L.J. 440 (1992).

[26] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

9.2 ACADEMIC FREEDOM AND CURRICULAR SPEECH

Chapter 3 showed that the school retains the power to control its own curriculum even in the face of most parental and student objections. But what about teachers? Do they have the right to exercise any control over what they teach in their own classrooms, or does the school have absolute control?

The doctrine that teachers have the right to control their own curriculum and instructional methodology is known as "academic freedom." Although U.S. university professors customarily enjoy a high degree of academic freedom, public elementary and secondary teachers have a much more modest claim. Although many cases have been brought by teachers claiming academic freedom, no court has recognized the constitutional right of a teacher to control basic course content or instructional methodology.

In *Cary v. Board of Education of Adams-Arapahoe School District 28-J*,[27] the court ruled against teachers who claimed their First Amendment rights were violated when their school board removed ten books from a large list of books approved for use in elective junior- and senior-level literature classes. The board decreed that any teacher who assigned these books, gave credit for reading the books, had the books read aloud in class, or discussed the books at significant length could be dismissed. Although upholding this policy, the court noted that teachers do have "some rights to freedom of expression" in junior and senior classrooms. Teachers "cannot be made to simply read from a script prepared or approved by the board. . . . Censorship or suppression of expression of opinion, even in the classroom, should be tolerated only when there is a legitimate interest of the state which can be said to require priority." At the same time, the court said it was legitimate for the curriculum of the school to "reflect the value system and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs." If the board has the power to not offer a particular elective course as it surely does, said the court, it also has the authority to select the major texts of the courses it does offer. The case would have been different, the court continued, if the removal had represented a systematic effort to exclude a particular system of thought or philosophy. However, because the teachers did not claim they were prohibited from studying an entire representative group of writers, their position amounted to a desire "to be freed from the 'personal predilections' of the board," and this wish, the court concluded, had no constitutional basis.

Similarly, in *Millikan v. Board of Directors of Everett School District*,[28] the court found against teachers who wished to offer a team-taught social studies course of their own design instead of the "conventional" course approved by the board. The majority of students in the school, when offered a choice between the two courses, had opted for the conventional course. In deciding the case, the court noted that the course the teachers wished to offer differed significantly from the conventional course in content as well as instructional methodology (the proposed course centered around the use of "discovery techniques"—small group work, independent reading and writing, and inquiry). "Course content," said the court, "is manifestly a matter within the board's discretion." The court's position regarding instructional methods was less absolute: "[T]eachers should have some measure of freedom in teaching techniques employed." Nevertheless, after reviewing a variety of related cases, the court endorsed the principle that "a school district has authority to prescribe both course content and teaching methods." Moreover, the court concluded that if the unconventional teaching methods detract from the scope of a conventional history course, the teachers "may be compelled to abandon their own preferred techniques and to teach history in a more conventional manner."

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[27] 598 F.2d 535 (10th Cir. 1979).

[28] 611 P.2d 414 (Wash. 1980) (en banc).

These cases do not mean that in classroom situations the school can always put whatever words it chooses into a teacher's mouth. In one case, a federal appeals court protected a teacher's refusal to participate in a school-mandated flag salute. The court found that the teacher's refusal did not disrupt her tenth-grade class, in part because another teacher was in the room to lead the exercise.[29] However, if the refusal had been viewed as part of a pattern of depriving the students of access to the prescribed curriculum, the teacher would probably have lost.[30]

Courts have had a more difficult time dealing with teachers dismissed for introducing materials or methods to supplement the prescribed program. Some courts have protected teachers from dismissal when they were not given notice that a specific book, article, movie, or a general type of material was forbidden. These rulings are in keeping with the general procedural due process principle that forbids punishment without prior notice that the behavior was prohibited. For example, in *Kingsville Independent School District v. Cooper*,[31] a nontenured high school teacher used a role-playing simulation to teach the history of the post-American Civil War Reconstruction period. The school decided not to renew her contract because the school received numerous complaints about the controversial nature of the simulation. The court held that the simulation was protected speech, and the discharge "cannot be upheld unless the discussions clearly overbalance her usefulness as an instructor."

Similarly, in *Mailloux v. Kiley*,[32] a high school teacher wrote the word "fuck" on the blackboard, asked a student what the word meant, and explained that the definition, "sexual intercourse," is not a taboo word in our culture, but the word on the blackboard is. The teacher did this "to illustrate that to some extent a society and its ways are illustrated by its taboo words." This discussion was to help explain the meaning of a book legitimately assigned to the students. The district court found that the case involved

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[29] Russo v. Central Sch. Dist. No. 1, 469 F.2d 623 (2d Cir. 1972).

[30] Palmer v. Board of Educ. of Chicago, 603 F.2d 1271 (7th Cir. 1979).

[31] 611 F.2d 1109 (5th Cir. 1980).

[32] 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

"the use of teaching methods which divide professional opinion." The court found that in such a case "the state may suspend or discharge the teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by a regulation or otherwise that he should not use that method." The district court found that no such warning had been given and therefore ordered the defendants to reemploy the teacher.

Not all courts have been as protective of teachers' choices as *Cooper* and *Mailloux*. *Krizek v. Cicero-Stickney Township High School District No. 221*[33] concerned a nontenured teacher whose contract was not renewed because she showed an R-rated movie containing nudity, "vulgarity," and "sexually explicit scenes" to her high school English class. The court determined that the issue under consideration was one of reasonableness: Was it reasonable for the school to refuse to renew the teacher's contract because she showed the film? The court based its answer to this question on two factors:

> The first is whether the school could reasonably find the showing of the film offended 'legitimate pedagogical concerns' . . . given the school's right to establish the contents of the curriculum. The second factor is the severity of the sanction. . . . It is not reasonable to fire a teacher for any indiscretion; the indiscretion must be of significant enough importance to justify such a severe sanction.

Applying this analysis to the facts of the case, the court decided that it was reasonable for the school to conclude that the teacher's actions raised legitimate pedagogical concerns about her judgment that were serious enough to justify nonrenewal (see text of case in sec. 10.4).

Teachers are vulnerable to dismissal when, against school policy, they deliberately refuse to obtain prior approval for supplementary materials.[34] Teachers may also be dismissed if they proselytize or conduct religious activities in their class[35] or use their classroom as a platform to instigate specific political action by their students.[36] One court allowed the dismissal of a teacher who alluded in class to a rumor that two students had engaged in sexual intercourse on campus.[37]

The academic freedom cases have all been lower court decisions. The Supreme Court itself has never held that the First Amendment establishes a right of academic freedom for public school teachers. If the current Supreme Court were to rule on this issue it is likely that at most a very narrow and limited right to academic freedom would be affirmed. We can infer this result from the Court's decisions in *Hazelwood v. Kuhlmeier* (see sec. 4.3) and in *Rust v. Sullivan*,[38] permitting Congress to bar physicians receiving federal funds from discussing abortion with their patients.

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[33] 713 F. Supp. 1131 (N.D. Ill. 1989).

[34] Fisher v. Fairbanks North Star Borough Sch. Dist., 704 P.2d 213 (Alaska 1985).

[35] Breen v. Runkel, 614 F. Supp. 355 (W.D. Mich. 1985).

[36] LaRocca v. Board of Educ. of Rye City Sch. Dist., 406 N.Y.S.2d 348 (App. Div.); *appeal dismissed*, 386 N.E.2d 266 (N.Y. 1978); Birdwell v. Hazelwood Sch. Dist., 491 F.2d 490 (8th Cir. 1974).

[37] Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991).

[38] 500 U.S. 173 (1991).

IN-SCHOOL, NONCURRICULAR SPEECH

Schools have broad latitude to determine what and how their teachers will teach; however, does this mean that schools can control the content of everything that teachers say while they are at work or in the presence of students? Or do teachers have the right to express their personal views to colleagues and students, for example, by wearing an armband or button or distributing literature on their free time?

A majority of the courts that have considered these issues have recognized the existence of in-school, noncurricular speech not subject to the same level of control as curricular speech. In deciding disputes over teacher in-school, noncurricular speech, most cases have applied the approach first developed for use with students in *Tinker v. Des Moines* (see sec. 4.2): A teacher's speech is protected as long as it does not materially and substantially disrupt the school and its operations. Thus, in *Texas State Teachers Association v. Garland Independent School District*,[39] the court agreed with the plaintiffs that it was unconstitutional for the school to prohibit teachers from engaging in discussions concerning any teacher union or organization "on school premises during school hours, even though those discussions occur during lunch hour or other non-class time." It was also unconstitutional for the school to forbid teachers to use the school's intramural mail system to distribute union-related information because there was no general prohibition against using the system for personal messages nor any material and substantial disruption of the school. However, the court did note that it would be a violation of the Texas constitution's prohibition against giving public funds to a private organization if the district were to permit employees to engage in union promotional activities on a "release time" basis.

James v. Board of Education of Central District No. 1[40] differs from *Garland* in that the teacher's speech took place in the classroom. Like *Tinker*, the case concerned an individual, but this time a teacher, who wore a black armband in school to protest U.S. involvement in the Vietnam War. When James refused his administrator's order to remove the armband, he was suspended and eventually fired by the school board. The board justified its action by arguing that all teacher speech occurring during a class is curricular speech over which the school has broad control. The court, however, took a different view. Although agreeing with the board's claim of control over the curriculum and with the principle that teachers cannot claim the right to substitute political proselytizing or indoctrination for carrying out their assigned duties, the court nevertheless found the firing unconstitutional. The court noted that there was no hint of disruption caused by James' actions nor any reason to expect disruption. Most importantly, wearing the armband did not in any way interfere with James' ability to carry out his teaching functions. For the firing to be justified, said the court, "school authorities must demonstrate a reasonable basis for concluding that the teacher's conduct threatens to impair their legitimate interests in regulating the school curriculum." However, James had made no attempt to proselytize his students and since the mature eleventh graders whom James taught understood that the armband was only a symbol of the teacher's personal views, the curriculum was not disrupted. Furthermore, the board had engaged in viewpoint discrimination because it had permitted another teacher to display a slogan supportive of U.S. foreign policy and, in firing James had cast a "pall of orthodoxy" over the classroom in direct violation of the principles announced by the Supreme Court in *Tinker*.

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[39] 777 F.2d 1046 (5th Cir. 1985), *aff'd*, 479 U.S. 801 (1986).
[40] 461 F.2d 566 (2d Cir. 1972).

9.3 PRIVACY, MORALITY, AND LIFESTYLE

There are two types of privacy issues that can lead to conflict between a school and its employees. The first type of issue arises when schools seek to control the personal lifestyle choices and behaviors of their employees. The second arises when schools seek to acquire information about their employees that the employees do not wish the schools to have.

Many states' statutes authorize dismissing a teacher for "immorality" or "unprofessional" conduct (see sec. 10.4). These somewhat vague categories seem to authorize firing for behavior and lifestyle choices that the community or school board deems wrong or unfitting for teachers. However, some personal choices, no matter how a community might view them, are protected by the derived constitutional right to privacy.[41] This does not mean that the Constitution provides teachers absolute immunity from discharge for lifestyle choices. It does mean, however, that if the right of privacy is implicated, the school must have an especially good reason for the dismissal.

There is no firm definition or rule to draw a distinction between protected and unprotected lifestyle choices. One court upheld a school's dress code requiring that male teachers wear ties to class. A teacher objected claiming he had a First Amendment free speech right and a liberty right under the Fourteenth Amendment to do his job without a tie. In support of his First Amendment claim the teacher said that his refusal to wear a tie "made a statement on current affairs which assists him in his teaching." The court found this claim of symbolic speech to be vague and unfocused and that the teacher had other more effective means of communicating his social views to his students: "He could, for example, simply have told them his views on contemporary America; if he had done this in a temperate way, without interfering with his teaching duties, we would be confronted with a very different First Amendment case." Balancing the teacher's First Amendment claim against the board's interest "in promoting respect for authority and traditional values, as well as discipline in the classroom, by requiring teachers to dress in a professional manner," the court found that the dress code was a rational means to promote these goals. Regarding the Fourteenth Amendment claim, the court concluded that the liberty interest not to wear a tie was not of great constitutional weight. "As public servants in a special position of trust, teachers may properly be subjected to many restrictions in their professional lives which would be invalid if generally applied." The court noted that the rule did not affect teachers' appearance when they were off duty.[42] Likewise, most courts will uphold dress regulations for teachers unless they are arbitrary and unreasonable. Thus, the dismissal of a teacher who refused to stop wearing short skirts to school was upheld.[43]

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[41] Griswold v. Connecticut 381 U.S. 479 (1965).

A minority of courts has recognized a teacher's hairstyle as a protected interest and permitted regulation only if necessary to avoid disruption of the school or advance some other compelling educational purpose.[44] In one such case, a Black teacher brought a successful suit on privacy and equal protection grounds against a school rule controlling male hair styles and prohibiting facial hair.[45] However, most courts have said that hairstyle and grooming regulations are permissible unless the teacher can establish that the requirements are not rationally related to a legitimate purpose of the school—a burden that teachers usually cannot meet.[46]

From matters of appearance, this section next addresses issues of marriage, sexual behavior, and sexual preference. A series of Supreme Court opinions has established the principle that government policies affecting family, marriage, and procreation are impermissible unless necessary to the achievement of a compelling state interest. Based on this principle, the Court has rejected laws prohibiting the use of contraception, banning all abortions, and barring people with unmet child-support obligations from marrying.[47] In general, schools may regulate employee behavior in these areas only if regulation is necessary to achieve a very important educational purpose. In one case, a federal court concluded that a school district could not refuse to rehire a teacher because of her divorce: "[M]atters involving marriage and family relationships involve privacy rights that are constitutionally protected."[48] There are, however, some situations in which school regulation of employee marital relationships is constitutionally permissible. In one case, a federal court backed a school district's decision not to rehire a teacher whose wife had assaulted him violently and burst into his classroom to threaten his life. The court denied that the right to marry gave the teacher a right "to engage in domestic altercations in the classroom of a public high school," especially "potentially explosive and dangerous" altercations.[49] Another court permitted a school district to transfer a teacher who married her assistant principal. The district had a policy prohibiting any employee supervising a near relative, and the court concluded that the policy served to preclude the "perception of favoritism on the part of other members of the teaching faculty."[50] In another case, the school district went even further when it did not renew a high school principal's contract because he married a teacher in his school. Despite the fact that the district's effort to avoid conflicts of interest and favoritism deeply affected the right to marry, the court ruled the policy did not offend the Constitution.[51]

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[42] East Hartford Educ. Ass'n v. Board of Educ. of East Hartford, 562 F.2d 856 (2d Cir. 1977).
[43] Tardif v. Quinn, 545 F.2d 761 (1st Cir. 1976).
[44] Finot v. Pasadena City Bd. of Educ., 58 Cal. Rptr. 520 (Ct. App. 1967).
[45] Conard v. Goolsby, 350 F. Supp. 713 (N.D. Miss. 1972).
[46] Domico v. Rapides Parish Sch. Bd., 675 F.2d 100 (5th Cir. 1982).
[47] Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Zablocki v. Redhail, 434 U.S. 374 (1978).
[48] Littlejohn v. Rose, 768 F.2d 765 (6th Cir. 1985).
[49] Mescia v. Berry, 406 F. Supp. 1181 (D.S.C. 1974), *aff'd*, 530 F.2d 969 (4th Cir. 1975).
[50] Solomon v. Quinones, 531 N.Y.S.2d 349 (App. Div. 1988).

What then is the constitutionality of dismissing a teacher for committing adultery? Some courts have rejected dismissal for adultery even in disapproving communities but generally not on constitutional grounds.[52] However, in *Hollenbaugh v. Carnegie Free Library*,[53] the Supreme Court refused to review a case that had sustained the dismissal of two library employees for living together in open adultery.[54] Notorious or open adultery, it appears, is simply not a constitutionally protected right. The courts have, however, protected unwed mothers from dismissal, rejecting claims that the teacher's presence in the classroom would serve as a bad role model and encourage sexual activity on the part of the students.[55]

The constitutionality of dismissing a teacher for homosexuality is not fully decided. One court ruled that the Constitution permitted dismissal of a teacher who revealed her homosexuality to other school employees;[56] however, another court found impermissibly overbroad a state statute that permitted dismissing a teacher for "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity that creates a substantial risk that such conduct will come to the attention of schoolchildren or school employees."[57] Several cases have upheld the constitutionality of dismissing teachers for engaging in homosexual acts in public or making homosexual advances to other adults at school.[58] However, a federal district court in Ohio recently ruled that firing a teacher simply for being gay violated the teacher's Fourteenth Amendment right to equal protection of the law.[59]

In the absence of controlling federal court rulings, we can only speculate about the constitutionality of dismissing a teacher for homosexual orientation or actually practicing gay sex in a nonpublic, nonnotorious way. Regarding homosexual orientation, we believe that such a dismissal would be unconstitutional. As shown in Section 9.1, the Court affords broad protection to people's beliefs, feelings, preferences, and desires. On the other hand, we believe that some courts might uphold a dismissal for actually practicing gay sex because the Supreme Court has said that states may classify homosexual sex as criminal sodomy. Thus, people do not have a constitutional right to engage in homosexual sex.[60] It would seem to follow that if engaging in homosexual sex may be the basis of criminal prosecution, some courts would also permit engaging in homosexual sex to be the basis of dismissal from public employment.[61] However, some courts might not permit dismissal of a teacher for violation of a state sodomy law unless there was also a showing of an unfitness to teach (see sec. 10.4 on state statutory grounds for dismissal).

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[51] Keckeisen v. Independent Sch. Dist. No. 612, 509 F.2d 1062 (8th Cir. 1975).

[52] Erb v. Iowa State Bd. of Pub. instruction, 216 N.W.2d 339 (Iowa 1974).

[53] 439 U.S. 1052 (1978).

[54] *See also*, Johnson v. San Jacinto Junior College, 498 F. Supp. 555 (S.D. Tex. 1980).

[55] Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (Former 5th Cir. 1982); Andrews v. Drew Mun. Separate Sch. Dist., 507 F.2d 611 (5th Cir.), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed*, 425 U.S. 559 (1976).

[56] Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

[57] National Gay Task Force v. Board of Educ. of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided Court*, 470 U.S. 903 (1985).

[58] Sarac v. State Bd. of Educ., 57 Cal. Rptr. 69 (Ct. App. 1967); Stephens v. Board of Educ., Sch. Dist. No. 5, 429 N.W.2d 722 (Neb. 1988).

[59] Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

Several other school district regulations limiting employee lifestyle choices have been challenged on constitutional grounds: The Fifth Circuit upheld a school policy prohibiting substantial outside employment during the school year, finding it reasonably related to the school's interest in ensuring that teachers devote their professional energies to the education of children.[62] The Supreme Court allowed a school district policy requiring their employees to live in the district.[63] Several courts have prohibited the dismissal of public-school classified employees for enrolling their children in private segregated schools.[64] Another court reached the opposite conclusion.[65]

The Family and Medical Leave Act[66] seeks "to balance the demands of the workplace with the needs of families; and to promote national interest in preserving family integrity." The Act "entitles employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, or parent, who has a serious health condition." The term "child" includes biological, adopted, and foster children, step-children, and legal wards. The Act applies to public school districts and private schools with fifty or more employees at any one site. Employees are covered once they have worked for at least a year, provided that they worked at least 1,250 hours during the year prior to the leave. Employees may take up to twelve weeks of unpaid leave within a twelve month period. The employee may take the leave intermittently (e.g., a day or two at a time), or as a reduced work week. The leave arrangement needs to be coordinated with the employer unless it is a "medical necessity." Teachers or others whose absence would disrupt the instructional program of the school are subject to special provisions. When a teacher requests a leave that is "foreseeable based on planned medical treatment" and when the teacher would be on leave for more than twenty percent of the total work days during an instructional period, the school may require that the leave be taken for a particular time period not to exceed the planned medical treatment or require the employee to temporarily transfer to an alternative position.

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[60] Bowers v. Hardwick, 478 U.S. 186 (1986).

[61] Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); *contra*, Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988); Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

[62] Goseny v. Sonora Indep. Sch. Dist., 603 F.2d 522 (5th Cir. 1979).

[63] McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).

[64] Fyfe v. Curlee, 902 F.2d 401 (5th Cir. 1990); Brantely v. Surles, 718 F.2d 1354 (5th Cir. 1983).

[65] Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975).

[66] 29 U.S.C. §2601.

EMPLOYEE SEARCHES AND INVESTIGATIONS

May school districts insist that employees undergo medical examinations or drug and alcohol screening procedures to see if they are physically or mentally fit to perform their duties? May employees be required to divulge personal information as a condition of employment? If a teacher has an office at school, may administrators enter it and examine its contents? May school officials examine the contents of a teacher's desk or filing cabinet or handbag? What limitations does federal law place on the power of schools to gather information about their employees?

The Fourth Amendment protects individuals from unreasonable searches and seizures by the government. *New Jersey v. T.L.O.* established the principle that public schools may only search students if they have reasonable suspicion that the search will reveal evidence of wrongdoing (see sec. 5.3). But does the same principle apply to teachers and other school employees?

Although it occurred in a hospital rather than a school, the case most relevant to this issue is *O'Connor v. Ortega*.[67] In that case, a doctor objected to his employer's search of his office in a public hospital. Although the case produced no majority opinion, only a nonprecedent-setting plurality opinion, a majority of the justices did agree that the Fourth Amendment's protection against unreasonable search and seizure does extend to public employees. The plurality opinion suggests that the Fourth Amendment applies only to areas where an employee has a reasonable expectation of privacy, a determination that must be made on a case-by-case basis. Employees do have reasonable expectations of privacy with regard to personal closed containers such as handbags, locked luggage, and brief cases. However, an employee's expectation of privacy regarding desks, lockers, and filing cabinets "may be reduced by actual office practices and procedures, or by legitimate regulation." The more other employees and supervisors have frequent access to these areas, the less the expectation of privacy. Even if a public employee has a reasonable expectation of privacy, the employer may still conduct a search if the search is "reasonable":

> Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. . . . The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]."

The plurality and concurring opinion in *O'Connor* indicate that the majority of the Court would accept reasonable intrusions into a protected area for routine work-related purposes such as to hunt for needed supplies or to uncover evidence of work-related malfeasance.

Because *O'Connor* occurred in a nonschool setting and because the case produced no majority opinion, it does not fully settle the application of the Fourth Amendment to educators. Nevertheless, it does seem clear that school employees have reasonable expectations of privacy in their handbags, brief cases, and other personal packages brought to school. To the extent that desks, filing cabinets, storage areas, and lockers are shared with other employees, no reasonable expectation of privacy would obtain. Where an expectation of privacy does obtain, the requirements of the Fourth Amendment apply so a search may only be conducted in accordance with the "reasonable grounds" test quoted above.

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[67] 480 U.S. 709 (1987).

Mandatory drug testing of school employees raises another Fourth Amendment issue. In *Independent School District No. 1 of Tulsa County v. Logan*,[68] the court found that requiring school bus drivers to undergo annual "toxicological urinalysis" was not "unreasonable under the fourth amendment. . . . (T)he school district has a sufficient safety interest in maintaining a pool of bus drivers free from the effects of drug use to require drug screening as part of the annual physical examination without a particularized suspicion of drug use directed at any one individual employee. . . ."[69] The same reasoning might justify random testing of shop or driver education teachers, but most teachers do not occupy "safety-sensitive" positions. Thus, the highest state court of New York concluded that a school district's mandatory drug testing of all probationary teachers was an impermissible infringement of their Fourth Amendment rights.[70] However, the Fifth Circuit recently upheld a school's mandatory drug testing requirement for custodians.[71]

The federal Drug-Free Schools and Communities Act Amendments of 1989[72] requires that schools receiving federal assistance establish programs for both employees and students designed to prevent drug and alcohol abuse. Schools must annually distribute written materials specifying that it is unlawful to possess or distribute illicit drugs and alcohol, describing the legal sanctions for violation of the law, explaining the health risks associated with drugs and alcohol, listing available counseling programs, and warning that the school will impose its own sanctions for possession and use. The statute does not require districts to institute drug testing, but it does require enforcement of sanctions against those employees and students who violate drug and alcohol rules.

Daury v. Smith[73] concerned a school principal ordered to submit to a psychiatric examination as a condition of being rehired. The principal had been involved in physical altercations with other administrators and with a child, had been the subject of numerous parental complaints, and had admitted to suffering from stress. In finding that the required examination did not violate the principal's right to privacy, the court emphasized that the school board's action was aimed at ensuring the safety of the students and teachers within the school. "A school [board]," wrote the court, "may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the [board] has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his or her supervision." The court also noted that the psychiatrist's report had not been made public and that the principal had been reinstated upon receiving a favorable report. However, the court went on to suggest that had the school board attempted to obtain personal information about the principal from the psychiatrist for reasons unrelated to the welfare of the students, the principal's privacy rights would have been violated. In addition to the constitutional limitations discussed in *Daury*, the Rehabilitation Act of 1973 and the Americans with Disabilities Act place statutory limitations on the authority of schools to order their applicants and employees to undergo medical and psychiatric examinations (see sec. 9.6) as do the statutes of some states.[74]

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[68] 789 P.2d 636 (Okla. Ct. App. 1989).

[69] *See also*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[70] Patchogue-Medford Congress of Teachers v. Board of Educ. of Patchogue-Medford, 510 N.E.2d 325 (N.Y. 1987).

[71] Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559 (5th Cir. 1998).

[72] 20 U.S.C. §1145g.

[73] 842 F.2d 9 (1st Cir. 1988); *see also*, Lyons v. Sullivan, 602 F.2d 7 (1st Cir. 1979).

As noted in sec. 9.1, the First Amendment's protection of the right of freedom of association has been interpreted by the Supreme Court to prohibit school boards from requiring teachers to disclose their associational ties and memberships.[75] Thus, schools may not retaliate against teachers who refuse to say whether they are a member of a particular group. Employees may also invoke their Fifth Amendment right against self-incrimination in refusing to answer employers' questions that might lead to criminal prosecutions against them.[76] An older Supreme Court case suggests that the invocation of the Fifth Amendment may be treated by the employer as the basis of a dismissal for insubordination;[77] however, subsequent Supreme Court decisions, although not explicitly overruling this precedent, suggest that employers may not dismiss employees for invoking their Fifth Amendment rights.[78] Thus, for example, school districts in states where homosexual sex is a crime may not dismiss teachers for refusing on Fifth Amendment grounds to say whether they have engaged in homosexual sex.

9.4 RACE, ETHNICITY, AND GENDER

Adverse employment decisions may lead to claims of discrimination based on race, ethnicity, gender, disability, age, or religion. Plaintiffs may challenge an allegedly inequitable salary structure or a decision not to hire or promote, or to transfer, demote, or fire.

Litigation of this kind may be based on the Equal Protection Clause or, more frequently, on one or more federal statutes prohibiting specific forms of discrimination and other unfair employment practices. Compliance with these statutes usually ensures compliance with constitutional mandates, but in some situations the Equal Protection Clause or another constitutional provision imposes more stringent requirements. Some states have state constitutional and statutory provisions that provide protection against discrimination in employment. Occasionally these provisions are also more stringent than federal law.

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[74] School Dist. No. 1 v. Teachers' Retirement Fund Ass'n, 95 P.2d 720 (Or. 1939); Cude v. State, 377 S.W.2d 816 (Ark. 1964).

[75] Shelton v. Tucker, 364 U.S. 479 (1960).

[76] Garrity v. New Jersey, 385 U.S. 493 (1967); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

[77] Beilan v. Board of Educ., 357 U.S. 399 (1958).

[78] Gardner v. Broderick, 392 U.S. 273 (1968); Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

The rest of this section considers issues of discrimination based on race, ethnicity, and gender. Sections 9.5 to 9.7 examine the law concerning discrimination based on religion, disability, and age, respectively.

Title VII of the Civil Rights Act of 1964 forbids discrimination in public and private employment on the basis of race, gender, color, religion, or national origin.[79] The **Civil Rights Act of 1991** supplements Title VII with additional antidiscrimination requirements.[80] **Title XI** of the Civil Rights Act of 1964 also prohibits gender discrimination in employment.[81] The **Pregnancy Discrimination Act of 1978**[82] prohibits employers from discriminating on the basis of pregnancy and specifies that Title VII's prohibition of discrimination on the basis of gender includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[83]

The federal agency charged with enforcing federal law prohibiting discrimination in employment is the **Equal Employment Opportunity Commission (EEOC)**. Employment discrimination complaints must be filed first with the EEOC or a related state fair-employment agency. If the EEOC ultimately fails to act or chooses not to take legal action, the employee may then go to court with a private suit.

The outline that follows lists the major categories of race (including ethnicity, color, and national origin) and gender discrimination cases. The subsections that follow the outline explain each category of case including the burden of proof and the type of evidence required.

I. Disparate treatment of an individual
    A. overt
        1. bona fide occupational qualification
        2. affirmative action
    B. covert or hidden motive
    C. mixed motive

II. Pattern or practice
    A. disparate treatment
    B. disparate impact
    C. sexual and racial harassment
        1. quid pro quo
        2. hostile environment

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[79] 42 U.S.C. §2000(e).
[80] 42 U.S.C. §1981.
[81] North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).
[82] 42 U.S.C. §2000(e).
[83] *See*, Mitchell v. Board of Trustees of Pickens County, 599 F.2d 582 (4th Cir. 1979).

DISPARATE TREATMENT OF AN INDIVIDUAL (DTI)

The hallmark of DTI cases is that the employer acted with an intent to discriminate on the basis of race or gender.[84] DTI cases may involve either overt or covert discrimination. The Civil Rights Act of 1991 amends Title VII by allowing DTI plaintiffs to seek not only reversal of the discriminatory decision, costs, and attorney fees but also compensatory damages and to demand a jury trial.[85]

In **overt DTI** cases the employer openly bases a difference in treatment on race or gender. A school might insist, for example, that a coach for girls' sports be female and thus refuse to hire an otherwise qualified male. In cases like these, there is no need for the complaining party to establish that gender or race was a criterion in the employment decision because it is admitted. The crucial issue is whether the school has an adequate reason for using the criterion.

Title VII explicitly permits gender to be the basis of a hiring decision when gender is a **bona fide occupational qualification** (**BFOQ**). Race can never be a BFOQ. The Supreme Court has said that the BFOQ exception is to be strictly limited to cases where an employee of a specific gender is "reasonably necessary to the normal operation of a particular business or enterprise.[86] In a case rejecting the exclusion of women from telephone line repair, the court said that the central question was whether the employer "had a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[87] In another case, the court held that gender could be a criterion in the hiring of a night security officer at a university because rape victims would be more comfortable reporting an attack to a female counselor.[88] Analogous reasoning might justify same-sex counselors at a school birth control clinic. A few other school jobs such as positions requiring supervision of a locker room or lavatory might also have gender as a BFOQ.

Another type of overt DTI case challenges the use of an **affirmative action** plan. Affirmative action plans seek to remedy past discrimination by giving preference to a particular gender or race. Objections to affirmative action plans may be brought under Title VII or the Equal Protection Clause. In *McDonnell Douglas Corp. v. Green*,[89] the Supreme Court fashioned the following three-step framework for dealing with cases brought under Title VII:

> 1. The complainant . . . must carry the initial burden under the statute of establishing a prima facie case [proof that will suffice unless refuted by other evidence] of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for

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[84] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[85] 42 U.S.C. §10201 *et seq.*

[86] Dothard v. Rawlinson, 433 U.S. 321 (1977); UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

[87] Weeks v. Southern Bell & Tel. Co., 408 F.2d 228 (5th Cir. 1969); *see also*, Hayes v. Shelby Mem'l Hosp., 726 F.2d 1543 (11th Cir. 1984).

[88] Moteles v. University of Pa., 730 F.2d 913 (3d Cir. 1984).

[89] 411 U.S. 792 (1973).

> which the employer is seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications. . . .
>
> 2. The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.
> 3. Once the employer has offered its explanation, the employee must show that the defense is pretextual for intentional wrongful discrimination.

In *Johnson v. Transportation Agency, Santa Clara County,*[90] the male plaintiff complained that he was more qualified than the female who was promoted and that he was denied the promotion because he was male. However, the Supreme Court upheld the affirmative action plan adopted by the Transportation Agency in order to increase the number of women employed as "skill craft workers." The Court agreed that there existed a "manifest imbalance" that reflected underrepresentation of women in a job category that was "traditionally segregated." The Court also noted that gender was but one factor in the hiring decision, that the plan was temporary, and that there were no quotas.

Compare this analysis and result to the following affirmative action case brought at about the same time as *Johnson* under the Equal Protection Clause rather than Title VII.

WYGANT v. JACKSON BOARD OF EDUCATION

Supreme Court of the United States, 1986
476 U.S. 267

Justice Powell announced the judgment of the Court and delivered an opinion in which The Chief Justice and Justice Rehnquist join, and in all but Part IV of which Justice O'Connor joins.

This case presents the question whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin.

I.

In 1972 the Jackson Board of Education, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (Union) that would protect employees who were members of certain minority groups against layoffs. The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.

When layoffs became necessary in 1974, it was evident that adherence to the CBA would result in the layoff of tenured nonminority teachers while minority teachers on probationary status were retained. Rather than complying with Article XII, the Board retained the tenured teachers and laid off probationary minority teachers, thus failing to maintain the percentage of minority personnel that existed at the time of the layoff. The Union, together with two minority teachers who had been laid off, brought suit in federal court (*Jackson I*), claiming that the Board's failure to adhere to the layoff provision violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. . . . Following trial, the District Court concluded that it lacked jurisdiction over the case. . . .

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[90] 480 U.S. 616 (1987).

Rather than taking an appeal, the plaintiffs instituted a suit in state court (*Jackson II*), raising in essence the same claims that had been raised in *Jackson I*. In entering judgment for the plaintiffs, the state court found that the Board had breached its contract with the plaintiffs, and that Article XII did not violate the Michigan Teacher Tenure Act. . . .

After *Jackson II*, the Board adhered to Article XII. As a result, during the 1976–1977 and 1981–1982 school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. The displaced nonminority teachers, petitioners here, brought suit in Federal District Court, alleging violations of the Equal Protection Clause, Title VII, 42 U.S.C. § 1983, and other federal and state statutes. . . . With respect to the equal protection claim,* the District Court held that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, the court decided that the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren, and upheld the constitutionality of the layoff provision.

The Court of Appeals for the Sixth Circuit affirmed. . . . We now reverse.

II.

Petitioners' central claim is that they were laid off because of their race in violation of the Equal Protection Clause of the Fourteenth Amendment. . . .

The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination. In this case, Article XII of the CBA operates against whites and in favor of certain minorities, and therefore constitutes a classification based on race. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal." We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.

III.

A.

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision. The court discerned a need for more minority faculty role models by finding that the percentage of minority teachers was less than the percentage of minority students.

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. This Court's reasoning in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), illustrates that the relevant analysis in cases involving proof of discrimination by statistical disparity focuses on those disparities that demonstrate such prior governmental discrimination. . . . Based on that reasoning, the Court in *Hazelwood* held that the proper comparison for determining the existence of actual discrimination by the school board was "between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." *Hazelwood* demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies.

Unlike the analysis in *Hazelwood*, the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. . . .

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*Petitioners have sought review in this Court only of their claim based on the Equal Protection Clause.

Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students. Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*).

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications. No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

B.

Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. Public schools, like other public employers, operate under two interrelated constitutional duties. They are under a clear command from this Court, starting with *Brown v. Board of Education*, 349 U.S. 294 (1955), to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. On the other hand, public employers, including public schools, also must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed discriminations based on race." These related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care. In particular, a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. In this case, for example, petitioners contended at trial that the remedial program—Article XII—had the purpose and effect of instituting a racial classification that was not justified by a remedial purpose. In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.

Despite the fact that Article XII has spawned years of litigation and three separate lawsuits, no such determination ever has been made. . . .

IV.

The Court of Appeals examined the means chosen to accomplish the Board's race-conscious purposes under a test of "reasonableness." That standard has no support in the decisions of this Court. As demonstrated in Part II above, our decisions always have employed a more stringent standard—however articulated—to test the validity of the means chosen by a State to accomplish its race-conscious purposes. . . .

Here . . . the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Layoffs disrupt these settled expectations in a way that general hiring goals do not.

While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

V.

We accordingly reverse the judgment of the Court of Appeals for the Sixth Circuit.

* * *

[O'Connor and White filed concurring opinions, Marshall filed a dissenting opinion, joined by Brennan and Blackmun. Stevens filed another dissenting opinion.]

* * *

The reasoning in *Wygant* suggests that if the *Johnson* case had been brought under the Equal Protection Clause instead of Title VII, the result would have been reversed. This makes no legal sense because a statute cannot authorize a government action that is impermissible under the Constitution. The Supreme Court clarified the situation somewhat in *Richmond v. J. A. Croson Co.*[91] by ruling that public employer affirmative action plans are constitutionally permissible only when: (a) undertaken to correct identifiable past racial discrimination by the very employer adopting the plan (not to redress the effects of past societal racial discrimination), (b) necessary to correct the past discrimination because racially neutral policies will not work, and (c) narrowly tailored to correct the past discrimination without aiding people who have not been discriminated against or unnecessarily harming innocent people.

The Third Circuit recently applied this framework to a Title VII case in ruling against a school district that in response to a financial crisis used race as the criterion for laying off a White teacher instead of a Black teacher with equal seniority. The court rejected the district's affirmative action plan because it was not designed to remedy past discrimination but rather as a way to achieve a desired level of faculty diversity, it was not sufficiently limited in time or scope, and the harm imposed on the innocent White teacher was substantial.[92] Although the case was never heard by the Supreme Court because the parties agreed to settle, we believe that the Court would have agreed with the Third Circuit that public employer affirmative action plans are permissible under Title VII only if they meet the *Richmond* criteria. In any case, public school affirmative action plans must comply with the *Richmond* criteria in order not to violate the Equal Protection Clause.

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[91] 488 U.S. 469 (1989).

[92] Taxman v. Board of Educ. of Piscataway, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997).

School affirmative action plans designed to achieve desired diversity in the teaching staff or to rectify a long history of racial discrimination in society in general now appear to be unconstitutional; however, affirmative action plans may be permissible in school districts that have been guilty of racial discrimination in their employment practices in the past. Affirmative action plans that include race-based transfers of teachers among schools may also be used as one element of a court-ordered desegregation plan; however, once desegregation has been achieved and the district declared "unitary" by a court, a school district may not continue to make employment decisions on the basis of race (see sec. 6.4).[93]

In affirmative action and other overt DTI cases, plaintiffs do not have to prove that employment decisions were based on race because it is admitted. In **covert or hidden motive DTI** cases, plaintiffs allege that considerations of race or gender affected hiring, firing, promotion, pay, or other employment decisions but there is no direct proof. Plaintiffs bear the burden of convincing the court that the employer intended to discriminate. The determination is made by using the three-part *McDonnell Douglas* framework introduced earlier. Plaintiffs bear the initial burden of making a prima facie case of discriminatory intent. Plaintiffs need only show that they were rejected for a position for which they were qualified; they do not have to establish that they were the most qualified candidate or even as qualified as the person who was selected.[94] If the plaintiff succeeds, then the employer may attempt to refute the prima facie case by offering a nondiscriminatory reason for the decision. The employer need not persuade the court that it was actually motivated by the proffered reason but need only raise a genuine question regarding what motivated the action.[95] If the employer does so, then the plaintiff may attempt to show that the employer's reason was a pretext to justify intentional discrimination. In 1993, the Supreme Court explained the application of the framework to covert DTI cases as follows:

> Assuming then that the employer has met its burden of producing a nondiscriminatory reason for its actions, the focus of proceedings . . . will be on whether the jury could infer discrimination from the combination of (1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any con-

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[93] Kromnick v. School Dist. of Phila., 555 F. Supp. 249 (E.D. Pa. 1983).

[94] Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985); Abrams v. Johnson, 534 F.2d 1226 (6th Cir. 1976).

[95] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1931).

> trary evidence that may be available to the employer (such as evidence of a strong track record in equal opportunity employment).[96]

The most common method of proving pretext is to show that similarly situated persons of a different race or gender than the plaintiff received more favorable treatment (e.g., if a school district dismissed a Black employee for improperly using sick leave but did not discipline a White employee guilty of similar conduct[97]). Pretext may also be established if the proffered reason is simply false (e.g., if a school district lays off a Hispanic teacher claiming a budget short-fall that does not in fact exist[98]).

In *Ridler v. Olivia Public School System No. 653,*[99] a male applicant turned down for a job as a school cook brought a sex discrimination suit against the school. Ridler made his prima facie case by showing that he was a member of a protected class (gender) and that he had sought the job, that he was trained as a cook and had had several jobs as a cook (including related large-scale cooking in the National Guard), that despite his qualifications he was not interviewed for the job (in fact none of the male applicants were interviewed), and that the job was offered to a woman. The woman who was ultimately hired had no formal training in cooking, and her experience was limited to substitute work at the school and volunteer work at her church. The school offered as its nondiscriminatory reason that it had chosen the woman based on considerations of previous experience as a cook (especially for a large number of people), previous employment in the school district, and the applicants' work record and dependability. The school claimed that in light of these criteria the male applicants were less qualified.

Ridler, however, was able to establish that this explanation was a pretext for intentional discrimination. The record showed that the district had never hired a male cook and that generally several other job categories in the district were segregated by sex. The head cook referred to a position in the kitchen as "sandwich girl." The requirement that candidates have experience in the district had an illegitimate discriminatory effect because the school had never hired a male cook and, in any case, was an "after-the-fact" rationalization: The application form did not request information regarding this criterion, one interviewed applicant had no substitute cooking experience with the school, and the district did not interview another applicant who did have such experience. Furthermore, the district had acted inconsistently regarding the work-record criterion: Ridler was not interviewed despite his work in the National Guard, but a female candidate with no work record outside the home was interviewed. The district also applied the reliability criterion inconsistently when it interviewed a female applicant with a record of job stability no better than Ridler's. So, the court found that the school had discriminated against Ridler on the basis of gender in violation of Title VII and awarded him damages and attorney fees.

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[96] St. Mary's Honor Cent. v. Hicks, 509 U.S. 502 (1993); *see also*, Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 851 (1998).

[97] *See, e.g.*, Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984).

[98] *See, e.g.*, Hallquist v. Local 276, Plumbers, 843 F.2d 18 (1st Cir. 1988), *aff'g*, Hallquist v. Max Fish Plumbing & Heating Co., 46 Fair Empl. Prac. Cases (BNA) 1855 (D. Mass. 1987).

[99] 432 N.W.2d 777 (Minn. Ct. App. 1988).

Plaintiffs can cite many factors as evidence of intent to discriminate: (a) inconsistent application of employment criteria (e.g., asking women about family responsibilities but not men), (b) exclusive use of subjective criteria, (c) selective judgments made by evaluators of all one race or sex, (d) lack of objective proof that evidence was collected to support subjective judgments, (e) ad hoc tailoring of criteria in order to predetermine the outcome of a personnel decision, (f) establishment of job criteria that are not truly necessary job requirements, (g) proof that the plaintiff was objectively better qualified than the person selected, and (h) statistical evidence of a pattern in similar decisions.

This does not mean that Title VII requires an employer to hire or promote the objectively most qualified employee. Subjective criteria may enter into the decision-making process as long as they are legitimate, nondiscriminatory judgments related to the requirements of the job.[100] A school board is not restricted to hiring the candidates with the highest grades in college or the highest scores on a teacher's exam.

Title VII specifically forbids discrimination against employees because of opposition to practices made unlawful by Title VII, because the employee filed a suit charging the employer with discrimination, or because the employee participated in an investigation or proceeding dealing with employer discrimination. In **retaliatory discharge** cases the plaintiff asserts that an adverse employment decision was made because the plaintiff asserted legal claims under Title VII. A modified version of the *McDonnell Douglas* framework is used in these cases. To make the prima facie case, plaintiffs must prove that they were engaged in a protected activity such as asserting rights under Title VII, they suffered adversely for it, and there was a causal link between the protected activity and the employment decision.[101]

In **mixed motive DTI** cases, the plaintiff establishes that an employment decision was made partially because of a discriminatory reason. For example, a school may have had a preference for a male science teacher, but the female plaintiff may also have been less qualified or experienced than the successful male applicant. According to the Civil Rights Act of 1991, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." When the employer is able to demonstrate that the same action would have been taken in the absence of the impermissible motivating factor, the court still may not order reversal of the challenged decision, only cessation of the impermissible practice and attorney fees.

PATTERN OR PRACTICE (PP)

In PP cases, either the federal government brings a civil suit charging an employer with a pattern of discrimination against a particular race or gender or other protected group, or members of a protected group initiate a class action suit based on similar allegations. The alleged discrimination may consist of systematic **disparate treatment** of members of the group or of the use of policies that have a **disparate impact** on the group. PP cases are evaluated using the *McDonnell Douglas* framework. In disparate treatment PP cases, the plaintiff's prima facie case is usually based on statistics. For example, in a case alleging discrimination against Blacks in a school district's hiring policy, the plaintiff had to show "a statistically significant discrepancy between the racial composition of the teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[102] In a case charging a pattern of discrimination in promotions and salary, the plaintiff had to show that with all other variables—such as credentials and experience—held constant, the salary differences between men and women could only be explained by gender discrimination.[103]

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[100] McCarthney v. Griffin-Spaulding County Bd. of Educ., 791 F.2d 1549 (11th Cir. 1986).

[101] Muarry v. Sapula, 45 F.3d 1417 (10th Cir. 1995); Ruggles v. California Polytechnic State Univ., 797 F.2d 782 (9th Cir. 1986).

Disparate impact cases "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[104] For example, a racial or ethnic group might challenge the use of tests for hiring teachers that exclude a disproportionate number of minority candidates. Foreign-born candidates might challenge a preference for hiring teachers who speak unaccented English or who obtained their credentials in the United States. A woman might object to the practice—still found in some school districts—of seeking superintendents with nonworking spouses. (However, rules prohibiting the hiring of spouses of employees are permissible even if they have a disparate impact on one gender.[105]) The use of a selection committee disproportionately comprised of one race or gender might also lead to a disparate impact claim especially if the selection criteria are primarily subjective.[106] In disparate impact cases, unlike disparate treatment cases, intent to discriminate need not be proved. Disparate impact cases may not be brought under the Equal Protection Clause because the Supreme Court has said that disparate impact is not per se unconstitutional.[107]

According to Title VII, to make a prima facie disparate impact case, the plaintiff must establish that the employer uses a particular employment practice that causes a disparate impact on a protected group, for example, a preemployment test that "selects applicants for hire or promotion in a racial [or gender] pattern significantly different from that of the pool of applicants."[108] What counts as a significant difference is a matter of some controversy, but plaintiffs must demonstrate—often with statistics—a real difference that would have been unlikely to occur by chance. Once the prima facie case has been made, the employer may defend itself by showing that the challenged practice is "job related for the position in question and consistent with business necessity."[109] Although the precise meaning of this phrase is not clear, a plausible interpretation is that the challenged practice must have a significant, not just trivial, relation to the job. For example, an employer might argue for the validity of a strength test in a job requiring the loading of heavy packages by hand even though the test excluded most female candidates.

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[102] Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

[103] Craik v. Minnesota State Univ. Bd., 731 F.2d 465 (8th Cir. 1984).

[104] International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

[105] Sine v. Trustees of Cal. State Univ., 11 Fair Empl. Prac. Cases (BNA) 334 (E.D. Cal. 1974); *aff'd*, 526 F.2d 1112 (9th Cir. 1975).

[106] *See, e.g.*, Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982).

[107] Washington v. Davis, 426 U.S. 229 (1976); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[108] Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The third and final stage in disparate impact cases affords the plaintiff the opportunity to prevail by establishing pretext. The plaintiff must convince the court that the challenged practice unnecessarily disadvantages the protected group because it does not in fact aid the employer's business in any significant way. This can be done by showing that the challenged practice does not select the employees best able to serve the employer's legitimate (nondiscriminatory) business purposes, or by demonstrating the availability of other not excessively costly tests or selection devices that would serve the employer's legitimate interests equally well without the disparate impact and that the employer refuses to adopt.[110]

The following case considers a teacher's disparate treatment and disparate impact claims with regard to a teacher-eligibility examination.

RICHARDSON v. LAMAR COUNTY BOARD OF EDUCATION

United States District Court, Middle District of Alabama, 1989
729 F. Supp. 806, *aff'd*, 935 F.2d 1240 (11th Cir. 1991)

Myron H. Thompson, District Judge.

Plaintiff Alice Richardson, an African-American, has brought this lawsuit claiming that defendant Lamar County Board of Education wrongfully refused to renew her teaching contract in violation of Title VII of the Civil Rights Act of 1964, as amended. Richardson charges the school board with two types of discrimination under Title VII. First, she asserts a claim of "disparate treatment": that the school board refused to renew her contract because of her race. Second, she asserts a claim of "disparate impact": that the board's stated reason for not renewing her contract—that she had failed to pass the Alabama Initial Teacher Certification Test—is impermissible because the test has had a disparate impact on African-American teachers.

Based on the evidence presented at a nonjury trial, the court concludes that Richardson may recover on her disparate impact claim but not on her disparate treatment claim. The court's disposition of Richardson's disparate treatment claim is simple and direct. The court simply applies the procedure set forth by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The court's disposition of her disparate impact claim is, however, much more difficult. The court first addresses and finds meritless [the] defense raised by the school board: . . . that under the framework set forth in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), Richardson would not have been reemployed even if she had passed the state certification test. The court then goes through a lengthy application of the disparate impact analysis outlined by the Supreme Court in *Wards Cove Packing Co., Inc. v. Antonio*, 109 S.Ct. 2115 (1989).

I. BACKGROUND

Richardson taught in the Lamar County School System for three years, from 1983 to 1986. She was, however, unable to obtain a permanent teaching certificate and therefore had to teach with temporary and provisional certificates. To obtain a permanent certificate, Richardson, like all other teachers in the state at this time, had to pass the Alabama Initial Teacher Certification Test, which consisted of a "core" examination and an examination aimed at the specific area in which the teacher sought to teach. Richardson wanted to teach in the areas of early childhood education and elementary education, and thus could meet the certification test's specific area requirement by passing the examination in either area. Between 1984 and 1986, Richardson failed the early childhood education examination twice and the elementary education examination three times.

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[109] 42 U.S.C. §2000e-2(k)(1)(B)(ii).

[110] Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

In the spring of 1986, the Lamar County Board of Education decided that the elementary school where Richardson taught should be consolidated with another school. Because fewer teachers would be needed, the school board informed 15 nontenured teachers, including Richardson, that their contracts would not be renewed for the 1986–87 school year. Four of the 15 teachers were, however, rehired. Richardson, who would have acquired tenure if she had been rehired, was not one of the four.

Approximately a year later, in May 1987, this court enforced a consent decree requiring the State Board of Education to issue permanent teaching certificates to a court-defined class of black teachers who had failed the state teacher certification test. Richardson received her certification pursuant to the consent decree.

II. DISPARATE TREATMENT CLAIM

As stated, Richardson charges the Lamar County Board of Education with two types of racial discrimination: "disparate treatment" and "disparate impact." With the former, an employee must prove intentional discrimination. With the latter, however, the employee challenges "practices that are fair in form but discriminatory in operation," the employee need not prove intentional discrimination.

In *Burdine*, the Supreme Court set out the procedure a trial court should follow in assessing a disparate treatment claim. An employee has the initial burden of establishing a prima facie case of intentional discrimination, which once established raises a presumption that the employer discriminated against the employee. If the employee establishes a prima facie case, the burden then shifts to the employer to rebut the presumption by producing sufficient evidence to raise a genuine issue of fact as to whether the employer discriminated against the employee. This may be done by the employer articulating a legitimate, nondiscriminatory reason for the employment decision, a reason which is clear, reasonably specific, and worthy of credence. The employer has a burden of production, not one of persuasion, and thus does not have to persuade the court that it was actually motivated by the reason advanced. Once the employer satisfies this burden of production, the employee then has the burden of persuading the court that the proffered reason for the employment decision is a pretext for intentional discrimination. The employee may satisfy this burden by persuading the court either directly that a discriminatory reason more than likely motivated the employer or indirectly that the proffered reason for the employment decision is not worthy of belief. By so persuading the court, the employee satisfies her ultimate burden of demonstrating by a preponderance of evidence that she has been the victim of intentional discrimination.

Where, as here, however, a disparate treatment case has been fully tried, the court need not employ the full *Burdine* analysis, but may simply proceed directly to the ultimate issue of discrimination. . . .

Richardson may establish a prima facie case by showing that she is a member of a protected class; that she was qualified for her job; that she was not rehired; and that a person outside the protected class with equal or lesser qualifications was rehired. Richardson has shown that she is African-American and thus a member of a protected class; that she was qualified for the position of a teacher in the Lamar County School System; that she was not rehired for the 1986–87 school year, and that numerous nontenured white teachers with qualifications equal to hers, in the broad sense that she and the white teachers were all qualified to teach in the Lamar County School System, were rehired for that school year.

The Lamar County Board of Education has, however, articulated a legitimate, nondiscriminatory reason for treating Richardson differently from the nontenured white teachers: Richardson did not have a permanent teaching certificate. Richardson has not shown this reason to be a pretext for refusing to rehire her because of her race. If Richardson had been rehired, she would have been in her fourth year in the school system and would have acquired tenure under state law; she would have become a permanent teacher. The superintendent and school board reasonably concluded that they did not want a tenured, or permanent, teacher with only a provisional certificate. The nontenured white teachers who were rehired did not pose the same problem for the school board. Either they had permanent teaching certificates, or although they had only provisional or temporary certificates they would not have acquired tenure when rehired.

The court is sensitive to the fact that decision makers here, the superintendent and members of the school board are white. [S]ubjective judgments about African-American employees when exercised by all-while supervisors or executives should be received with caution. However, as explained, the court is convinced that it was reasonable for the school board to conclude that Richardson should not be rehired as a tenured teacher without a permanent teaching certificate. Richardson has not been a victim of intentional racial discrimination.

III. DISPARATE IMPACT CLAIM

The court turns next to Richardson's disparate impact claim. Richardson claims that the Alabama Initial Teacher Certification Test had an impermissible disparate impact on African-Americans, in violation of Title VII. The Lamar County Board of Education . . . claims . . . that under the framework set forth in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), she would not have been reemployed even if she had possessed a permanent teaching certificate. The school board also denies that the state teacher certification test violates Title VII. . . .

Price Waterhouse Defense

[T]he Lamar County School Board is essentially asking that the court use the "mixed motives" framework articulated by the Supreme Court in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989). Within this framework, if the plaintiff presents "direct evidence" that impermissible discrimination was a substantial, motivating factor in an adverse employment decision, then the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision even if it had not allowed the illegal discriminatory facts to enter its decisionmaking process. If the employer fails to sustain this burden, then the employee has established liability under Title VII. Relying on *Price Waterhouse*, the school board argues that, although it refused to renew Richardson's contract because she lacked a permanent teaching certificate, it would have taken the same action even if she had possessed one. The evidence does not support the school board's argument. The court is convinced, and so finds, that, if Richardson had passed the state teacher certification test by the end of the 1985–86 school year, the school board would have reemployed her for a fourth year.

First of all, when initially confronted in a pretrial deposition with the question of whether Richardson would have been reemployed if she had possessed a permanent teaching certificate, the school system's superintendent testified that "chances are she probably would." . . .

Secondly, the evidence submitted by the school board reflects that there were nine non-tenured elementary level teachers, who had passed the state teacher certification test, who had the same educational degree as Richardson had, and who had experience in the Lamar County School System that was less than, or equal to, Richardson's; these teachers were either immediately rehired at the end of the 1985–86 school year or although not retained at the end of that school year were later rehired [for] the 1986–87 school year. . . .

Moreover, the court does not believe the school board would have compared Richardson with the above nine teachers solely on the basis of their experience and education. The court believes that a critical factor would have been each teacher's actual teaching ability as observed by those in the school system. However, the school board had presented no such evidence comparing Richardson with the other nine teachers; in other words, the school board has not shown that Richardson was less qualified than the other nine teachers both on paper and in practice.

Disparate Impact Analysis

In assessing a disparate impact claim, a court should use a three-step process similar to the one used in assessing a disparate treatment claim. First, the employee must identify the specific employment practice challenged and, further, must show that the challenged practice falls significantly more harshly on one group than another, that is, that the practice under attack has created "adverse impact." If this showing is made, the burden then shifts to the employer to produce evidence of employment justification for the employment practice. The employer's burden is one of production not persuasion, for the burden of persuasion always remains with the employee. Finally, if the employer satisfies its burden, the employee may prevail only if she shows that the employer's justification for the practice has no basis in fact or that another practice, without a similarly undesirable adverse effect, would also serve the employer's legitimate employment interests.

Richardson has appropriately identified two components of the state teacher certification test—the early childhood education examination and the elementary education examination—which she contends have had a racially disparate impact on her and other African-Americans. The initial issue for the court is therefore whether these two examinations in fact have had such an impact.

ADVERSE RACIAL IMPACT

Adverse impact may be established by statistical evidence alone so long as the statistical pool—or sample, if appropriate—is logically related to the employment decision at issue and the method of comparison applied to that pool or sample is meaningful. In testing cases, it is well established that actual examinees constitute the most logical statistical pool, and that the appropriate method of comparison to be applied to that pool is a measurement of the differences in pass-fail rates.

In the present case, the pass and fail data were segregated into three categories, only one of which is useful. . . . A final category organizes data according to the pass-fail rates for those persons taking the test for the first time. Stated differently, the data record the extent to which black and white examinees passed or failed the test on their first try. The court is of the opinion that, of the data presented, this "first time" category is the most appropriate for a determination of adverse impact.

There is no set mathematical threshold that must be met in order to show significant disparate impact and various formulas can be used to measure the degree of impact in a specific case. The Equal Employment Opportunity Commission (EEOC) generally regards a selection rate that is less than ⅘, or 80%, of the rate for the group with the highest rate as an indication of significant adverse impact. Other courts have stated that, if the difference between the expected value and the observed number is greater than two or three standard deviations, then adverse impact has been shown. And one commentator has proposed that, in cases involving challenges to employment tests, courts should use the "test for difference between independent proportions." Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 Harv. L. Rev. 793, 797–800 (1981). In this case, however, the court need not decide what formula should be used to show adverse impact, because under any of the formulas both the early childhood education and the elementary education examinations have had a clear and significant adverse impact on African-American persons. The results of the application of the formulas to the early childhood education examination are as follows:

(1) *EEOC formula:* From June 1981 until June 1985, 310 black persons took the early childhood education examination for the first time, and 127 of them passed, for a pass rate of 41%. For this same period, 2,607 white persons took the examination for the first time, and 2,374 of them passed, for a pass rate of 91.1%. Thus, the pass rate for black persons is only 45% of that for white persons, well below 80%.

(2) *Hazelwood formula:* The difference between the expected value and the observed value is over eight standard deviations, much more than two or three standard deviations.

(3) *Shoben formula*: The "Z" value under the test for difference between independent proportions is over 23, much more than the 1.96 necessary to support a finding of adverse impact.

The results of the application of the formulas to the elementary education examination are as follows:

(1) *EEOC formula:* From June 1981 until June 1985, 496 black persons took the elementary education examination for the first time, and 246 of them passed, for a pass rate of 49.6%. For this same period, 4,144 white persons took the examination for the first time, and 3,885 of them passed, for a pass rate of 93.8%. Thus, the pass rate for black persons is only 53% of that for white persons, well below 80%.

(2) *Hazelwood formula:* The difference between the expected value and the observed value is over nine standard deviations, much more than two or three standard deviations.

(3) *Shoben formula:* The "Z" value under the test for difference between independent proportions is over 29, much more than the 1.96 necessary to support a finding of adverse impact.

EMPLOYMENT JUSTIFICATION

Since Richardson has established that the early childhood education and elementary education examinations had an adverse racial impact, the burden shifts to the Lamar County Board of Education to produce evidence of employment justification. An understanding of the history of the Alabama Initial Teacher Certification Test is important to determining whether the school board has met its burden and, if so, whether Richardson has, in turn, shown that the school board's justification for the certification test has no basis in fact.

a. History of the Early Childhood Education and Elementary Education Examinations

In 1979, amidst a national groundswell in favor of teacher competency testing, the Alabama State Board of Education placed development of a uniform certification test at the head of its agenda. It retained a professor at Auburn University to conduct a feasibility study regarding implementation of a teacher testing program in Alabama; the state's Assistant Superintendent for Teacher Certification also participated in the study. After a rather cursory investigation, the two educators recommended implementation of a testing program similar to one designed by a private test developer for the State of Georgia.

The State Board agreed with the recommendation. In January 1980, it awarded a contract to the private test developer on a noncompetitive basis. While the board did not always express its purpose for imposing the test requirement with perfect clarity, both the test developer and the board understood that the test would measure whether a teacher possessed enough minimum content knowledge to be competent to teach in the classrooms of Alabama.

The time frame for development of the Alabama Initial Teacher Certification Test, as it came to be known, was quite short. The test developer had one year to complete development and implementation of 36 separate examinations. The test developer created a "core" examination and 35 additional examinations that covered specific subject areas. As stated, a teacher had to pass the core examination and one subject area examination in order to receive certification.

The Assistant State Superintendent, the sole ranking state official charged with oversight of the private test developer's contract compliance, had a octorate in educational administration; but neither nor anyone on his staff had any expertise in test elopment. And no outside experts were retained o monitor the test developer's work. The developer's work product was accepted by the state largely on the basis of faith. . . .

b. Validity of the Early Childhood Education and Elementary Education Examinations

The Lamar County Board of Education contends that the state teacher certification test was designed to determine whether a teacher is competent to teach in Alabama's classrooms. Richardson claims, as stated, that the early childhood education and elementary education examinations were invalid, that they did not measure competency.

Generally, validity is defined as the degree to which a certain inference from a test is appropriate and meaningful. It is suggested that validity evidence must necessarily be restricted to success on the job; and, to be sure, there are Title VII decisions that have approached the question of validity by asking whether a given score on a test yields an appropriate and meaningful inference about successful performance on the job. However, there is no magic to using success on the job as an anchor point for validity. Success on the job is just one of many constructs that a test can measure. Thus, a sound inference as to a different construct, such as minimal competence, may also form the basis for a finding of validity. In short, a test will be valid so long as it is built to yield its intended inference and the design and execution of the test are within the bounds of professional standards accepted by the testing industry.

In order to be valid, a licensure or certification test must support the inference that persons passing the test possess knowledge necessary to protect the public from incompetents. Part of an appropriate validation strategy for licensure and certification tests is to define clearly and correctly the domain of minimum content knowledge necessary for competence. The test domain, once defined, must then be translated into actual test questions that measure competence. At all stages, validity flows from the expert judgment of practitioners in the field being tested. The test developer's role is to employ professionally accepted practices that accurately marshal the expert judgment of those practitioners. When the questions on a given test actually measure what practitioners in the field consider to be content knowledge associated with competency, the test instrument is held to possess content validity. However, mere content validity does not alone establish test validity. No matter how valid the test instrument, an inference as to competence or incompetence will be meaningless if the cut score, or decision point, of the test does not also reflect what practitioners in the field deem to be a minimally competent level of performance on that test. Again, the test developer's role in setting a cut score is to apply professionally accepted techniques that accurately marshal the judgment of practitioners.

In assessing the overall validity of the Alabama Initial Teacher Certification Test, the court must therefore address both content and cut-score validity. . . . For reasons that follow, the court concludes that the developer's procedures violated the minimum requirements for professional test development. Accordingly, none of the examinations, including the early childhood education and elementary education examinations, possesses content validity.

The test development process was outside the realm of professionalism due to the cumulative effect of several serious errors committed by the developer when it formulated the 45 examinations in 1981 and 1982. First, while practicing teachers were asked to offer their judgment about the job relatedness of test objectives, it is clear that the test developer's survey instrument distorted that judgment. Scales were balanced in favor of finding job relatedness and respondents were specifically instructed to resolve all doubts in favor of job relatedness. Moreover, the response of those teachers who indicated that they had not used an objective was ignored.

Second, Alabama educators serving on curriculum committees selected test objectives based on those survey results. . . .

Third, a significant number of items appearing on the examinations failed to reflect accurately the collective judgment of curriculum committee members. In some cases, changes to actual test items were not implemented. In other cases, items that had never been reviewed by a curriculum committee appeared on examinations. . . .

Fourth, Alabama educators were never asked to determine whether the test items themselves were job related, even though such an approach is standard practice in the testing industry.

Fifth, many items appeared on the examinations even after they had been rated content invalid by the requisite number of Alabama panelists. . . .

In 1983, the test developer conducted a topicality review for ten of the examinations already in use. . . . The topicality review process resulted in changes to, or replacement of, only about 50% of any given examination's 120 items. Items that were not revised or replaced therefore remained just as invalid as they were at birth. Moreover, as to items that were revised or replaced, there was no separate content validity determination. . . .

Richardson advances an array of challenges to the cut-score methodology employed by the test developer. It is clear that, as to the 35 examinations developed in 1981, the cut scores bear no rational relationship to competence as that construct was defined by Alabama educators. The evidence reveals a cut-score methodology so riddled with errors, that it can only be characterized as capricious and arbitrary. There was no well-conceived, systematic process for establishing cut scores; nor can the test developer's decisions be characterized as the good faith exercise of professional judgment. The 1981 cut scores fall far outside the bounds of professional judgment.

First and foremost, it is undeniable that cut scores for the 35 examinations developed in 1981 do not reflect the judgment of Alabama educators who served as panelists on the minimum cut score committees. This is a crucial error, because competence to teach is a construct that can only be given meaning by the judgment of experts in the teaching profession. Here, expert panelists who rated an item invalid as to content were automatically disqualified from going on to indicate whether that item should be counted toward the minimum cut score. This means that when a panelist indicated that an item should be excluded—because it contained inaccurate content, did not measure an objective, was tricky, ambiguous, or misleading, or was biased—that panelist's opinion was ignored for purposes of determining whether the item measured competence and should contribute to the cut score. The exclusion of such opinions resulted in a series of cut scores that reflected a distorted notion of competence.

Second, the court has no doubt that, after the results from the first administration of those 35 examinations were tallied, the test developer knew that its cut-score procedures had failed. . . .

Third, instead of notifying the State Department that its cut-score procedure had malfunctioned, the test developer attempted to mask the presence of system failure by making various unilateral mathematical "adjustments" to the original cut score until an "acceptable" score had been reached. . . . Again, however, the fatal error is that it was the developer, and not Alabama educators, that exercised this judgment. . . .

In reaching the above conclusions, the court has been sensitive to a number of factors. First of all, as stated earlier, close scrutiny of any testing program of this magnitude will inevitably reveal numerous errors, and these errors will not be of equal footing. Secondly, cut scores cannot be determined with mathematical certainty, and political considerations may properly enter into cut-score decisions. The court's task therefore is to assess the sum gravity of the defects found, and to determine whether, as a result of these defects, the examinations are invalid as to content and cut scores. The court recognizes that, in carrying out this task, it must proceed with caution, and even deference. Although the court must assess the credibility of testimony advanced by each side and arrive at an independent judgment, the court should not readily set aside the findings of those who developed a test; the mere fact that the court sees things differently should not, by itself, be considered sufficient to impeach such findings. But while a court should eschew an idealistic view of test validity, it should also be careful not to apply an "anything goes" view. In other words, the mere presence of conflict in expert testimony does not prove that a test fails to meet minimum standards; nor does it prove that a test meets such standards. A court should find a test invalid only if the evidence reflects that the test falls so far below acceptable and reasonable minimum standards that the test could not be reasonably understood to do what it purports to do. The court is convinced that this was the case with the Alabama Initial Teacher Certification test, and in particular with the early childhood education and elementary education examinations.

IV. RELIEF

Since Richardson is entitled to prevail on her disparate impact claim, the court must now determine her relief. The court will require that the Lamar County Board of Education reemploy Richardson as an elementary school teacher at a salary and with such employment benefits and job security as would normally accompany the position had she been employed in the school system since 1983. The court will also require that the school board pay her all backpay and other employment benefits she would have received had the school board reemployed her for the 1986–87 school year. The court will also require that the school board pay reasonable attorney's fees to her attorney. 42 U.S.C.A. §2000e–5(k). The court will give Richardson and the school board an opportunity to agree, between themselves, to the appropriate amount of attorney's fees, present pay, backpay, and other employment benefits to which Richardson is entitled. If the parties are unable to agree, the court will then set these matters down for a hearing. . . .

* * *

Richardson is one of several cases challenging standardized testing of teachers. Plaintiffs have often prevailed in these cases because either the test was misused or the test itself or the cut-off score was not properly validated.[111] However, in *United States v. South Carolina*,[112] the court upheld the use of the National Teacher's exam to certify teachers and set teacher pay scales.

Gender discrimination in compensation is illegal both under Title VII and under another federal statute, the **Equal Pay Act**.[113] This law is violated when unequal wages are paid to men and women for "equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions." A difference in pay, however, can be justified by four defenses: a seniority system, a merit pay system, a system that measures pay by quality and quantity of production, or any other factor not based on sex. The most common equal-pay issue in education is paying male and female coaches different salaries. Resolution depends on actual job content, not job descriptions, regarding such matters as amount of time worked.[114] Fringe benefits such as health and pension plans must also be provided on a nondiscriminatory basis.[115]

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[111] United States v. Texas, 628 F. Supp. 304 (E.D. Tex. 1985), *rev'd on other grounds*, 793 F.2d 636 (5th Cir. 1986); York v. Alabama State Bd. of Educ. 581 F. Supp. 779 (M.D. Ala. 1983); United States v. North Carolina, 400 F. Supp. 343 (1975), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977).

[112] 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

[113] 20 U.S.C. § 206(d).

SEXUAL AND RACIAL HARASSMENT

The regulations implementing Title VII define sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[116]

As the regulations indicate, only behaviors of a sexual nature can constitute sexual harassment. The creation of a generally unpleasant or offensive work atmosphere or nonsexual practical jokes played on all faculty members regardless of gender would not violate Title VII.[117] Behavior by a member of the same sex is covered by Title VII as long as it fits the definition of harassment.[118] In order for behavior to constitute sexual harassment, it must be unwelcome. The harassed person must not have solicited the behavior and must have communicated to the harasser that the behavior was not desired. Either direct confrontation of the harasser or a persistent failure to respond to advances may be sufficient to communicate unwelcomeness.[119] That a person may have welcomed some sexual advances or conduct does not mean that all such behaviors are welcome.

There are two different forms of sexual harassment. In **quid-pro-quo harassment** an employee is asked to exchange sex for job benefits, continued employment, or promotion. Most courts require a showing of denial or loss of a tangible employment benefit as part of a prima facie case of quid-pro-quo harassment. Thus, in one case, a teacher lost a sexual harassment suit against her principal because she was not discharged or denied promotion or any other job benefit; she was dismissed only after refusing an offer to transfer to another school.[120] Employees who submit to unwelcome sexual advances must show that they were threatened with adverse consequences in order to make their prima facie case.[121] Some courts do not view a supervisor's retaliation against an employee who terminates a consensual sexual relationship as quid-pro-quo harassment.[122] To defend against a charge of quid-pro-quo harassment, the employer may either present a legitimate reason for the adverse employment action or show that the person who committed the harassment was not involved in the adverse decision.[123] The employee may then show that the employer's reason is pretextual, for example, by proving that a supervisor rewarded those employees who submitted and punished those who did not.[124]

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[114] Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985); EEOC v. Madison Community Unit Sch. Dist., 818 F.2d 577 (7th Cir. 1987); Perdue v. City Univ. of N.Y., 13 F. Supp. 2d 326 (E.D.N.Y. 1998).

[115] Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983); Los Angeles v. Manhart, 435 U.S. 702 (1978).

[116] 29 C.F.R. § 1604.11(a).

[117] *See, e.g.*, Vermett v. Hough, 627 F. Supp. 587 (W.D. Mich. 1986).

[118] Oncale v. Sundowner Offshore Serv., 523 U.S. 75 (1998).

[119] Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988).

[120] Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990).

[121] Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994).

Hostile-environment harassment, either sexual or racial, entails the claim that an employee was subjected to an intimidating, hostile, or offensive working environment because of the employee's sex or race. Although there have been more lawsuits involving sexual than racial harassment, both generally and in schools, the principles controlling both kinds of cases are similar. Both verbal and nonverbal conduct may create a hostile environment but only if (a) the conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,"[125] (b) the conduct is offensive (but not necessarily psychologically harmful[126]) to the victim, and (c) a reasonable person would also have been offended by the conduct.

To determine whether conduct is sufficiently pervasive or severe to constitute harassment, courts consider the nature of the conduct (touching is worse than verbal abuse[127]), the frequency or repetitiveness of the conduct, and the period of time over which the conduct occurred.[128] Thus, isolated jokes, inappropriate remarks, a single sexual proposition, or lewd comment (including in one case, the remark, "My penis stretches from here to District 1") are not usually sufficient to establish a hostile environment.[129] However, repeated generalized sexist jokes or comments or gender or race-based commentary about a person's appearance or behavior do constitute hostile-environment harassment.[130] One court ruled that a single stinging slap on the plaintiff's buttocks created a hostile environment.[131]

Because the statute is directed at employers, not individuals, educators harassed at work may sue their school district under Title VII but not the harassers themselves. This raises the issue of whether and under what circumstances a school district or other employer will be held responsible for the harassment of an employee by a supervisor or colleague. With regard to supervisors, the Supreme Court ruled that

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[122] Keppler v. Hinsdale Township Sch. Dist. 86, 715 F. Supp. 862 (N.D. Ill. 1989).

[123] Anderson v. University Health Ctr., 623 F. Supp. 795 (W.D. Pa. 1985).

[124] Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986).

[125] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[126] Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

[127] Redman v. Lima City Sch. Dist. Bd. of Educ., 889 F. Supp. 288 (N.D. Ohio 1995).

[128] Ross v. Double Diamon, Inc., 672 F. Supp. 261 (N.D. Tex. 1987).

[129] Cohen v. Litt, 906 F. Supp. 957 (S.D.N.Y. 1995).

[130] Smith v. St. Louis Univ., 109 F.3d 1261 (8th Cir. 1997); King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533 (7th Cir. 1990); *but see*, Becker v. Churchville-Chili Cent. Sch., 602 N.Y.S.2d 497 (N.Y. Sup. Ct. 1993).

[131] Campbell v. Kansas State Univ., 780 F. Supp. 755 (D. Kan. 1991); *but see*, Collins v. Baptist Mem. Geriatric Ctr., 937 F.2d 190 (5th Cir. 1991).

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. . . . No affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. . . . [However,] [w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, ... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[132]

Therefore, in order to minimize the possibility of liability for harassment by their supervisory employees, school districts should create, publicize, and enforce antiharassment policies with clearly defined complaint procedures and plans for dealing with allegations of harassment. A school should respond to allegations of harassment as quickly as possible, usually within hours or, at most, days. The investigation and any necessary remedial steps should be properly undertaken because a bungled investigation or ineffective remedial steps will not prevent liability.[133] School officials should also carefully document the prompt and appropriate remedial steps they take; not to do so may cause a jury to disbelieve the district's claims that it responded appropriately to a harassment complaint.[134]

The Supreme Court has not yet ruled on whether and when an employer is responsible for sexual or racial harassment of an employee by a colleague. Because one colleague cannot subject another to an adverse employment decision, the Fifth Circuit has ruled that harassment by a colleague does not fit the Title VII definition of harassment.[135] However, other circuits have ruled that employers may be liable under Title VII if supervisors knew about, acquiesced in, or orchestrated the harassment.[136] Because schools have been held liable for not dealing appropriately with known student-on-student harassment (see sec. 6.8), it seems likely that most courts would take the same position regarding employee harassment of colleagues. For this reason and as a matter of ethics, schools should include measures designed to prevent harassment by colleagues in their antiharassment policies. At the same time, in their investigations and responses to allegations of racial or sexual harassment of employees, whether by supervisors or colleagues, school officials should be careful not to violate the constitutional, statutory, or contractual rights of the accused.[137]

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[132] Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998). *See also*, Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

[133] Carr v. Allison Gas Turbine Div., 32 F.3d 1007 (7th Cir. 1994).

[134] Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997).

[135] Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997).

[136] Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996); Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. 1998).

9.5 RELIGION

Teachers who wish to practice their religion, wear religious garb, or otherwise manifest their religious beliefs at school create a difficult constitutional problem. To permit publicly paid teachers in religious clothing to teach a captive audience of impressionable children runs the risk of violating the Establishment Clause's prohibition against government promotion of religion. Yet, to prohibit teachers from wearing such clothes or taking other actions that are a requirement of their beliefs runs the risk of violating their right to the free exercise of religion.

In *Cooper v. Eugene School District No. 4J*,[138] the court upheld the constitutionality of a state law prohibiting public school teachers from wearing "religious dress while engaged in the performance of duties as a teacher," and the revocation of the teaching certificate of teachers who violate the rule. The rule was challenged by a middle school teacher punished for wearing a white turban as part of her practice of the Sikh religion. The teacher claimed that the rule violated her free exercise rights; however, the court felt that the rule was a legitimate way for schools to maintain religious neutrality. The *Cooper* court was careful to point out that it would not be permissible to fire a teacher for wearing an unobtrusive religious symbol such as a cross on a necklace or for occasionally wearing religious clothes.

Only when a teacher's overt and repeated display of religious garb or symbols might convey the message of school approval or endorsement does the court authorize dismissal. Nevertheless, one might still question whether the case was correctly decided. Is it true that children will perceive the wearing of a turban or yarmulke by a teacher as endorsement by the school of the religious beliefs of the teacher? In any case, how is Cooper's wearing of a white turban to express a religious belief different from the wearing of an armband to express a political belief?

Related issues arise when teachers seek to distribute religious materials on school grounds or to use school facilities for religious exercises prior to the start of the school day. Although these issues are not fully decided, courts seem likely to permit prohibition of any activity likely to give the appearance of school endorsement of religion. Therefore, a general ban on the distribution of religious literature by teachers might be permissible under the Free Exercise Clause and under the Establishment Clause, would probably be required (see sec. 3.3 and 3.4). At least one court has suggested that a school that permits teachers to meet informally before school to discuss topics of their own choosing might not be permitted to prohibit teacher prayer meetings, especially if the students and community are unaware of the meetings.[139]

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[137] *See, e.g.*, Lyons v. Barrett, 851 F.2d 406 (D.C. Cir. 1988).

[138] 723 P.2d 298 (Ore. 1986), *appeal dismissed*, 480 U.S. 942 (1987).

A different problem arises when teachers seek exemption from job requirements on free exercise grounds. In one case, a teacher refused to lead her kindergarten class in the pledge of allegiance, patriotic songs, or celebrations of holidays. Based on the framework developed in *Wisconsin v. Yoder*[140] (see sec. 2.2), the Seventh Circuit ruled that although the teacher's refusal was based on a sincere religious belief, it was not her right to reject the board's officially adopted curriculum.[141] In general, a teacher's free-exercise-based challenge to a school's rules or curriculum would be unlikely to succeed unless the rules or curriculum was adopted for the purpose of preventing the teacher from satisfying religious mandates. This principle follows from the Supreme Court's current view that the Free Exercise Clause does not relieve an individual of the obligation to comply with generally applicable valid laws.[142]

The desire to celebrate religious holidays sometimes puts teachers at odds with their employers. In one case, a Jewish teacher claimed that the school infringed upon his free exercise of religion when it required him to take personal leave or unpaid leave in order to observe his religious holidays. In contrast, Christian teachers could take their holidays without penalty because the school was closed. The court rejected the teacher's claim, reasoning that because the loss of a day's pay for time not worked did not constitute substantial pressure to modify behavior, the school's policy did not constitute an infringement of religious liberty.[143] In another case, the California Supreme Court ruled that it was a violation of the state constitution to dismiss a teacher for being absent without permission in order to observe a religious holiday. The court said that the district was required to accommodate the teacher's religious needs by allowing a reasonable amount of unpaid leave, five to ten days a year.[144]

In addition to the Constitution, Title VII of the Civil Rights Act of 1964 (see also sec. 9.4) also protects teachers against religious discrimination in employment. The term religion is not defined in Title VII, but the courts have given it a sufficiently broad definition to include not only traditional theistic religions but also a sincere and meaningful belief that plays a role analogous to belief in a god. The regulations of the EEOC state that the

> [c]ommission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. . . . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to

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[139] May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105 (7th Cir. 1986).

[140] 406 U.S. 205 (1972).

[141] Palmer v. Board of Educ. of Chicago, 603 F.2d 1271 (7th Cir. 1979).

[142] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

[143] Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Counties, 735 F.2d 388 (10th Cir. 1984).

[144] Rankins v. Commission on Prof'l Competence, 593 P.2d 852 (Cal.), *appeal dismissed*, 444 U.S. 986 (1979).

> belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.[145]

One court held that Title VII protected an employee's atheistic beliefs and prohibited requiring her to attend employee meetings that included religious ceremonies.[146] However, employee beliefs will not be protected if they are merely personal lifestyle preferences[147] or if they are not sincerely held. An employee who claimed he should not work on Sundays lost his Title VII claim when it was shown that in the past he had worked on Sundays.[148] Nevertheless, the courts are willing to tolerate a degree of inconsistency recognizing that a person's commitment to religion can grow over time.[149]

Title VII permits religious schools to discriminate in hiring and other employment decisions on the basis of religion (but not on the basis of race or gender).[150] Title VII also recognizes that religion can be a bona fide occupational qualification (see sec. 9.4), which conceivably might justify religious discrimination in some private school employment but never in public schools. Cases alleging covert disparate treatment of individuals on the basis of religion are litigated using the *McDonnell Douglas* framework discussed in section 9.4.

Title VII requires accommodation of "all aspects of religious observances and practices as well as belief, unless an employer demonstrates that he is unable to accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Furthermore, "an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship." The Supreme Court has defined "undue hardship" as "more than de minimus costs to the employer."[151] An inference of discrimination will be drawn if an employer asks an otherwise qualified prospective employee about the need for accommodation and then rejects the applicant.

Ansonia Board of Education v. Philbrook[152] concerned a teacher whose religious obligations required him to miss approximately six days of school per year. The contract between the school district and its teachers permitted only three days per year of paid religious leave. The district was willing to accommodate the teacher's religious beliefs by allowing him to take the additional three days off without pay, but the teacher argued that he should be allowed to use days from another category of permissible paid leave and so receive pay for the missed days. The Supreme Court ruled that Title

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[145] 29 C.F.R. §1605.1.

[146] Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).

[147] Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).

[148] Hansard v. Johns-Manville Prod. Corp., 5 Fair Empl. Prac. Cases (BNA) 707 (E.D. Tex. 1973).

[149] *See, e.g.*, Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994).

[150] Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).

[151] TWA v. Hardison, 432 U.S. 63 (1977).

[152] 479 U.S. 60 (1986).

VII only requires an employer to make a reasonable accommodation to an employee's religious obligations, not necessarily the accommodation the employee would prefer. Furthermore, the Court said that unpaid leave will usually be a reasonable accommodation unless paid leave is available for all other purposes except religion. The Court explained its ruling as follows:

> In enacting [Title VII] Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs. The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work. Generally speaking the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.

9.6 DISABILITY

Disabled employees are protected by two of the same federal laws that protect disabled children (see sec. 7.2). The older of these two laws, the Rehabilitation Act of 1973 (§ 504), provides that "no otherwise qualified handicapped individual" shall be excluded from participation in a program receiving federal financial assistance "solely by reason of his handicap."[153] This law applies only to programs receiving financial assistance.

However, the newer law, the Americans with Disabilities Act (ADA) of 1990[154] is not qualified in this way. Replacing the term handicap with disability, ADA's central provision regarding employment is that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job applications procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."

Both of these laws apply to people who have "a physical or mental impairment which substantially limits one or more such person's major life activities," have a record of such an impairment, or are regarded as having such an impairment. The regulations define "major life activities" to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." The regulations further state that an "impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person. . . ." One court ruled that a man who had fractured his hip and subsequently walked with a limp, had trouble climbing stairs, and could walk only about a mile without a cane was not substantially limited with regard to the major life activity of walking.[155] For a disability to count as substantially limiting a person's ability to work, the disability must affect the ability to "perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Relying on this regulation, the Eleventh Circuit ruled that an incontinent teacher was not covered by the ADA because she had not shown that she could not perform a broad range or class or jobs.[156]

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[153] 20 U.S.C. §701 et seq.

[154] 42 U.S.C. §§12101–12213.

[155] Kelley v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996).

Only permanent or long-term impairments count as disabilities. "[T]emporary, nonchronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment." The plaintiff in one case was five foot six inches tall and weight 375 pounds. Depending on the temperature she could walk 500 yards and a physician estimated she suffered a fifty percent disability. Nevertheless, the court found that she was not sufficiently substantially impaired to be covered, but it also noted that she might qualify under another facet of the definition—being regarded as having an impairment.[157]

Two recent Supreme Court opinions address the issue of whether individuals qualify as disabled under ADA if as a result of mitigating measures such as eye glasses or medicine their impairments are no longer substantially limiting. The Court ruled that mitigating measures may be taken into account when determining if individuals are disabled even when the mitigating measures control, but do not cure, an impairment. A person who can see normally with eyeglasses or whose hypertension is controlled by medication is not protected by ADA. The Court also ruled that an employer does not violate ADA when it fails to hire an applicant whom the employer mistakenly believes suffers from an impairment that would prevent the applicant from performing a specific job such as "global airline pilot." ADA would be violated if an employer mistakenly believed that an applicant had an impairment that prevented the applicant from performing a broad class of jobs, i.e., that the applicant had an impairment that substantially limited the major life activity of working.[158]

People currently engaged in the illegal use of drugs are not covered by Section 504 and the ADA, but those participating in a drug rehabilitation program are. Alcoholics whose use of alcohol "prevents such an individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others" are not covered. Nonstandard sexual orientations and preferences such as bisexuality and transvestitism are specifically excluded from coverage.

Regarding Section 504, the Supreme Court has said the definition of a handicapped person includes those with an infectious disease such as tuberculosis, and a lower court has included a teacher carrying the HIV virus but not suffering from AIDS.[159] ADA regulations provide that a person who poses a "direct threat" to the health and safety of others is not covered. The term "direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. In deciding whether a teacher with AIDS could be excluded from the classroom and reassigned to an administrative position, the Ninth Circuit looked at four factors: (a) the nature of the risk—how the disease is transmitted, (b) how long the carrier is infectious, (c) the potential harm to third parties, and (d) the probability the disease would be transmitted and cause harm. After examining the scientific evidence, the court found that there was no apparent risk of HIV infection to individuals exposed only through the type of contact that occurs in the course of a teacher's job and so ordered the teacher returned to the classroom.[160]

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[156] Swain v. Hillsborough County Sch. Bd., 146 F.3d 855 (11th Cir. 1998).

[157] Nedder v. Rivier College, 944 F. Supp. 111 (D.N.H. 1996).

[158] Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999); Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133 (1999).

Of course, the fact that a person is disabled does not mean that the person must be employed. The law only prohibits discrimination against disabled people who are "otherwise qualified"; that is, who despite their disability have the training, experience, abilities, and skills to perform the essential requirements of the job they seek or hold.[161] When interviewing job applicants, school officials may "inquire into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." Job applications may not inquire whether an applicant is an individual with disabilities, the nature or severity of an applicant's disability, or ask how often the individual will require leave for treatment or use leave as a result of a disability. Neither may school districts require an applicant to undergo a medical examination prior to making a job offer, but they may require a medical examination after making an offer.

If an otherwise qualified disabled job applicant or employee can perform the essential functions of a job with reasonable accommodation, a failure to provide reasonable accommodation is unlawful unless the school can demonstrate that the accommodation would impose an undue hardship on it.[162] The essential functions of a job are its fundamental duties as opposed to marginal functions, the elimination of which, would not significantly alter the position as the employer has defined it. For example, being able to convey information orally is an essential function of most teaching jobs, but being able to type quickly usually is not. Undue hardship is determined by taking into account the costs and overall financial resources of the school district, the effect of the accommodation on other employees, and whether the accommodation would fundamentally alter the nature or operation of the education program. Reasonable accommodation may include modifying facilities, equipment, or work schedules; job restructuring; or the acquisition of special equipment. When designing reasonable accommodations, the law requires the employer to engage in an "informal interactive process" with the disabled employee and to make a good faith effort to design accommodations that will make it possible for the employee to perform the essential functions of the job.[163] If more than one set of accommodations would permit the employee to perform the essential functions of the job, the employer retains the ultimate authority to choose the accommodations that are the cheapest or easiest to provide.

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[159] School Board of Nassau County v. Arline, 480 U.S. 273 (1987); Chalk v. United States Dist. Court & Orange County Superintendent of Sch., 840 F.2d 701 (9th Cir. 1988).

[160] Chalk v. United States Dist. Court & Orange County Superintendent of Sch., 840 F.2d 701 (9th Cir. 1988).

[161] *See*, Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983).

[162] Southeastern Community College v. Davis, 442 U.S. 397 (1979).

In addition to prohibiting discrimination against employees who are themselves disabled, ADA also prohibits discrimination against employees "because of the . . . disability of an individual with whom the [employee] is known to have a relationship or association." This provision is violated if the employer declines to hire someone because the employer believes the applicant would miss work or leave work early to care for a disabled family member or if the employer provides reduced health insurance benefits because the employee has a dependent with a disability. However, the law does not require reasonable accommodation—for example, a change in work schedule—of an employee without a disability in order to enable the employee to care for a disabled dependent.

Schools may be accused of violating Section 504 and ADA for engaging in hidden motive disparate treatment of a disabled employee, for adopting polices and practices with a disparate impact on disabled employees, for failing to make reasonable accommodations for otherwise qualified disabled employees, or for engaging in retaliation against employees for asserting rights under the statutes or aiding in investigations to enforce the statutes. Disparate treatment cases employ the same *McDonnell Douglas* framework examined in section 9.4. The plaintiff bears the initial burden of establishing a prima facie case of intentional discrimination: that the plaintiff was an otherwise qualified individual with disabilities who suffered an adverse employment decision. The school may then defend itself by showing that the adverse employment decision was taken for legitimate nondiscriminatory reasons.

Schools charged with adopting policies that have a disparate impact on qualified disabled individuals must show that the policies are job-related and consistent with business necessity and that reasonable accommodations are not possible. *Pandazides v. Virginia Board of Education*[164] concerned a probationary teacher who was not rehired because she was unable to pass a standardized test that was a requirement of permanent certification in her state. The teacher argued that she was an otherwise qualified person who was unable to pass the test because of a learning disability and that, as applied to her, the standardized test requirement was impermissible under Section 504. The Fourth Circuit ruled that in order to determine whether the teacher was "otherwise qualified" within the meaning of the statute, it was necessary to consider more than just whether the teacher could satisfy the state board of education's requirements for a teaching certificate (passing the test). Rather it was necessary to consider whether the teacher could perform the essential functions of the job of school teacher and whether the test actually "measured those functions." Furthermore, even if it was determined that the teacher could not perform all the duties of the job, it would still be necessary to determine whether reasonable modifications could be made that would allow her to teach. The case was remanded to the district court to make the necessary determinations.

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[163] Taylor v. Phoenixville School District, 9 Am. Disabilities Cas. (BNA) 311 (3d Cir. 1999).
[164] 946 F.2d 345 (4th Cir. 1991).

Schools charged with failing to make reasonable accommodations may defend themselves by demonstrating either that they did offer reasonable accommodations that were rejected or that any possible effective accommodations would impose undue hardship on the district. To successfully defend a suit charging retaliation, the school would have to show that the adverse employment decision was taken for legitimate reasons other than retaliation.

The Civil Rights Act of 1991 permits a disabled person victimized by intentional discrimination to sue for compensatory and punitive damages. A school that fails to make a good faith effort to satisfy the reasonable accommodation or other requirements of Section 504 and the ADA would be vulnerable to such a suit.

9.7 AGE

Intentionally treating employees differently on the basis of age raises both constitutional and statutory issues. The Supreme Court dealt with the constitutionality of mandatory retirement in *Massachusetts Board of Retirement v. Murgia*.[165] Because age classifications do not trigger strict scrutiny, the Court rejected the plaintiffs' claim that a mandatory retirement policy violated the Equal Protection Clause because the policy was rationally related to the goal of assuring a physically fit police force. Applying this approach, the Second Circuit concluded that a mandatory retirement policy was constitutionally permissible in that it served, among other things, to foster employment of young people.[166] However, the Seventh Circuit has held that mandatory retirement might be unconstitutional.[167]

The uncertainty regarding the constitutionality of mandatory retirement of teachers is a moot point in light of the **Age Discrimination in Employment Act of 1978 (ADEA)**. This federal statute protects people above the age of forty from discrimination on the basis of age with regard to hiring, firing, and other terms and conditions of employment.[168] Thus, mandatory retirement for teachers is prohibited by law. Litigation under ADEA follows the same framework as other disparate treatment and disparate impact cases.[169] Although ADEA recognizes that age may sometimes be a bona fide occupational qualification, it is unlikely that this narrowly defined exception would ever apply to a teaching position. Thus, a school charged with disparate-treatment age discrimination must defend itself by showing that the adverse employment decision was based on legitimate factors other than age.[170]

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[165] 427 U.S. 307 (1976).

[166] Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978).

[167] Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977).

[168] 29 U.S.C.A. §§ 623, 631.

[169] Western Air Lines v. Criswell, 472 U.S. 400 (1985).

In disparate impact cases, the school must show that its practice is justified as a business necessity; the school then will prevail unless the plaintiff can show that an alternative practice would serve the same business purpose without the discriminatory effect. The law also permits a school to defend itself by showing that it was observing a bona fide seniority system or employment benefit plan that was not a subterfuge to evade the law.[171] This framework was used by a court to decide whether a school district's seniority-based salary schedule was permissible under the ADEA. Because the salary schedule made experienced teachers more expensive, the district had adopted a hiring policy that favored hiring less experienced teachers, a policy that had a discriminatory impact on older applicants. Nevertheless, the court concluded that the pay system was a bona fide seniority-based system and had not been adopted with a discriminatory intent.[172]

Early retirement plans and reductions in force may raise difficult issues under the ADEA. Truly voluntary early retirement plans are permitted;[173] however, when incentives are offered for early retirement, the employer must demonstrate legitimate, nondiscriminatory reasons for the plan.[174] Retirement benefits may also be keyed to the age of retirement as long as the differences in benefits are based on nonage-related reasons like cost.[175] Lay-offs in accordance with a legitimate seniority system are permitted, but laying off older workers first in order to save money is not.[176]

9.8 SUMMARY

A school's treatment of its employees is a delicate area of education law. The school has both a right and an obligation to ensure that all its employees perform the legitimate duties of their jobs. However, the school's power over its teachers and other employees is limited because they retain the same constitutional rights as any citizen. Many cases require balancing an employee's constitutional rights against a school's need to promote its goals.

Freedom of speech protects a teacher's right to advocate any political belief, either by symbolic or actual speech or through membership in a political party or organization. Teachers may speak freely on any matter of public concern including education issues, if their speech is not excessively disruptive, but the airing of private gripes may be prohibited even if not disruptive. Even on matters of public concern, speech that materially and substantially disrupts the school may be barred.

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[170] Kaufman v. Kent State Univ., 815 F. Supp. 1077 (N.D. Ohio 1993); Wooden v. Board of Educ. of Jefferson County, 931 F.2d 376 (6th Cir. 1991).

[171] 29 C.F.R. §1625.8.

[172] United States EEOC v. Newport Mesa Unified Sch. Dist., 893 F. Supp. 927 (C.D. Cal. 1995).

[173] Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir. 1987).

[174] Cipriano v. Board of Educ. of North Tonawanda, 785 F.2d 51 (2d Cir. 1986).

[175] Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988).

[176] 29 C.F.R. § 1625.7(f).

Within the classroom, freedom of speech affords only limited protection. Teachers may be required to adhere closely to the curriculum and instructional methods chosen by the school. Public K–12 teachers have only a very modest claim to academic freedom.

The right of privacy affords school employees some protection in matters of lifestyle and morality. Although some issues such as the right to use contraception or to become pregnant are well settled, others are not. Some courts have permitted firing for adultery or homosexuality and others require a proven connection between the behavior and the ability to do the job. Teachers enjoy Fourth Amendment protection against unreasonable searches and seizures. Mandatory drug testing may be permissible for bus drivers and other employees whose impairment would pose a direct and significant threat to the safety of students; however, random drug testing of all teachers is probably unconstitutional.

Although schools must make reasonable accommodations to a teacher's religious beliefs, freedom of religion does not provide an exemption from the essential duties of the job. In particular, a teacher may not claim a religion-based right to modify the curriculum, a practice that would violate the Establishment Clause. In accommodating employees' religious beliefs, schools must avoid appearing to endorse them. Thus, the Free Exercise Clause does not give teachers the right to recite prayers openly within the classroom or, at least according to some courts, to dress in religious garb. Free exercise does protect a teacher's right to take a reasonable number of days off for religious observance, not necessarily with pay, or to wear unobtrusive symbols of faith.

Discrimination is a very active and complex area of employment law. The Equal Protection Clause, the Civil Rights Acts of 1964 and 1991, and several other federal statutes protect both employees and prospective employees of the school from discrimination based on race, gender, religion, disability, or age. Although summarizing the thrust of these laws is difficult, employment decisions must not be based on any of these characteristics unless there is an extremely compelling rationale. Race must never influence employment decisions, except possibly in certain carefully crafted affirmative action programs designed to remedy past discrimination by a particular employer. Gender may perhaps be a bona fide occupational qualification for a few education jobs, but the justification must be strong. Schools must make reasonable accommodations for disabled employees but are not obliged to employ disabled persons who are unable to perform the essential functions of the job. Mandatory retirement or gearing salary or benefits directly to age is illegal. Schools must not permit employees to be subjected to racial or sexual harassment.

CHAPTER 10

TEACHER EMPLOYMENT

Chapter 9 examined the federal constitutional and statutory law that forms the foundation of a school's relationship to its teachers and other professional employees. This chapter focuses directly on personnel issues: certification, hiring, job assignment, transfer, evaluation, nonrenewal, and dismissal. The primary source of law for the topics examined in this chapter is the statutes of the fifty states, although the Constitution is also relevant, particularly the Due Process Clause of the Fourteenth Amendment. Although the principles and cases presented are consistent with the law of most states, it must be remembered that personnel statutes and interpretations do vary across states, sometimes considerably. Therefore, practitioners should supplement the materials in this chapter with the relevant statutes of their state.

10.1 ELIGIBILITY FOR EMPLOYMENT

Eligibility for a particular teaching position in a public school requires a state-issued certificate. State certification requirements may include a requirement of good moral character, a college degree, specified courses, practice teaching, and, in more than half of the states, passing one or more examinations. In *Ambach v. Norwick*, the Supreme Court upheld a New York state regulation denying certification to non-U.S. citizens who had not shown an intention to apply for citizenship.[1]

Obtaining a certificate grants only eligibility for, not entitlement to, employment and it does not automatically signify competence. In the absence of a state-authorized waiver, schools may not hire a candidate without the proper certificate. Thus, a West Virginia court held that a school district abused its discretion when it hired a person certified in general education and mathematics as a teacher of the gifted instead of someone certified in gifted education.[2]

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[1] 441 U.S. 68 (1979).

Because teaching certificates have value, the law protects people against wrongful denial or revocation. The Due Process Clause prohibits arbitrary and capricious denial of a certificate to a candidate meeting all specified requirements.[3]

However, obtaining a certificate does not guarantee the right to retain it. Because certificates are not contracts (see sec. 11.6), states may change retention requirements without violating constitutional prohibitions against the impairment of contracts.[4] In addition, certificates can be revoked for good cause after following the procedures spelled out in state law; for example, Florida unconditionally revoked the certificate of two teachers found in possession of marijuana plants.[5]

Nevertheless, a number of states require that the grounds for revocation be connected to teaching effectiveness; in *Erb v. Iowa State Board of Public Instruction*,[6] the Supreme Court of Iowa prohibited the state board from revoking a high school teacher's certificate on the grounds of adultery. The court wrote:

> We emphasize the board's power to revoke teaching certificates is neither punitive nor intended to permit exercise of personal moral judgment by members of the board. Punishment is left to the criminal law, and the personal moral views of board members cannot be relevant. . . . The sole purpose of the board's power . . . is to provide a means of protecting the school community from harm. . . . (A) certificate can be revoked only upon a showing before the board of a reasonable likelihood that the teacher's retention in the profession will adversely affect the school community.

A person eligible for a teaching job by virtue of the requisite state certificate may still face additional requirements such as residency in the district or passing a physical examination. Courts have upheld these requirements against constitutional challenges.[7] Continuing education requirements may also be imposed on teachers as a condition of retaining their jobs.[8] The highest court of New York, however, struck down a school district requirement that probationary teachers pass a urine drug test to be eligible for tenure.[9]

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[2] Johnson v. Cassell, 387 S.E.2d 553 (W.Va. 1989); *see also*, Bradford Cent. Sch. Dist. v. Ambach, 436 N.E.2d 1256 (N.Y. 1982).

[3] Commonwealth v. Great Valley Sch. Dist., 352 A.2d 252 (Pa. Commw. Ct. 1976).

[4] State v. Project Principle, Inc., 724 S.W.2d 387 (Tex. 1987).

[5] Adams v. State, 406 So. 2d 1170 (Fla. Dist. Ct. App. 1981).

[6] 216 N.W.2d 339 (Iowa 1974).

[7] Pittsburgh Fed'n of Teachers Local 400 v. Aaron, 417 F. Supp. 94 (W.D. Pa. 1976).

[8] Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194 (1979).

[9] Congress of Teachers v. Board of Educ. of Patchogue-Medford Union Free Sch. Dist., 510 N.E.2d 325 (N.Y. 1987).

10.2 ASSIGNMENT, TRANSFER, AND DEMOTION

Once teachers have been hired, the board enjoys considerable discretion in assigning them to specific schools, classes, and extra duties. Like all personnel actions, however, assignments may not be discriminatory, violate state seniority or other statutory requirements, be done in retaliation for the legitimate exercise of a constitutional right, violate the terms of the teaching certificate, or violate either the teacher's contract or the collective bargaining contract.[10]

Refusal to accept assignment within the teacher's certification area is grounds for dismissal.[11] Similarly, refusal to accept lawful extra-duty assignments reasonably related to their job exposes teachers to dismissal for insubordination.[12] In judging the reasonableness of an extra-duty assignment, the courts consider such factors as the degree to which the assignment relates to the educational function of the school, the number of hours of the assignment, the relation of the assignment to the teacher's expertise, and the degree of impartiality in the assignment of extra duties.[13]

Extra duties may, however, be so removed from the basic responsibilities of a teacher that they cannot be required except by a supplemental contract that provides extra pay. Teachers who refuse to take on these extra-pay duties are not subject to dismissal.[14] However, teachers who perform extra duties do not obtain an entitlement to these jobs, so districts are free to remove teachers from, for example, coaching positions.[15]

Schools also enjoy broad discretion to transfer teachers. Unless a teacher can establish that the transfer was unlawful, not exercised in good faith for the best interests of the district, or an abuse of discretion, the refusal to accept the assignment is insubordination.[16] Transferring a teacher outside the area of the teacher's tenure may be prohibited unless the teacher consents. However, tenure does not give a teacher a vested right in a particular class or school.

Depending on state law, a transfer may constitute a demotion if it involves loss of pay, rank, reputation, or prestige. Demotions are permissible when, like dismissals, they are done for reasons specified in state law such as insubordination or budget cutbacks (see sec. 10.4 and 10.6). A demotion may entail the loss of a constitutionally protected interest and hence trigger constitutional due process protections (see sec. 10.5). State law may also specify hearing or other procedures that must be followed when demoting a teacher.[17] Demotions must also conform to the requirements of the collective bargaining contract.

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[10] Adtlet v. Richmond Sch. Dist., 58 Cal. Rptr. 151 (Ct. App. 1967); Gibbons v. New Castle Area Sch. Dist., 500 A.2d 922 (Pa. Commw. Ct. 1985); Appeal of Santee, 156 A.2d 830 (Pa. 1959).

[11] Commonwealth *ex rel.* Wesenberg v. School Dist. of Bethlehem, 24 A.2d 673 (Pa. Super. Ct. 1942).

[12] Harrisburg R-VIII Sch. Dist. v. O'Brian, 540 S.W.2d 945 (Mo. Ct. App. 1976); District 300 Educ. Ass'n v. Board of Educ. of Dundee Community, 334 N.E.2d 165 (Ill. App. Ct. 1975).

[13] Board of Educ. of Asbury Park v. Asbury Park Educ. Ass'n, 368 A.2d 396 (N.J. Super. Ct. Ch. Div.), *aff'd in part and appeal dismissed in part*, 382 A.2d 392 (N.J. Super. Ct. App. Div. 1977).

[14] Swager v. Board of Educ., Unified Sch. Dist. No. 412, 688 P.2d 270 (Kan. Ct. App. 1984).

[15] Lexington County Sch. Dist. 1 Board of Trustees v. Bost, 316 S.E.2d 677 (S.C. 1984).

[16] Goodwin v. Bennett County High Sch. Indep. Sch. Dist., 226 N.W.2d 166 (S.D. 1975).

10.3 PROBATIONARY TEACHERS: EVALUATION, RENEWAL, AND TENURE

States are not constitutionally required to create a system of probation and tenure for teachers, but most have chosen to do so. In most states, a teacher with less than three years of continuous service in the same school district is a probationary teacher. Upon receiving a fourth consecutive annual contract, a teacher achieves nonprobationary or "permanent" status, which some states call "tenure." States may modify or eliminate their tenure system[18] but must honor the terms of previous tenure commitments.[19] In states that have a tenure system, local school boards may not refuse to grant tenure because they oppose the system itself or require their employees to waive their right to earn tenure.[20]

Some states place requirements on the evaluation of teachers, such as specifying the number of times that a teacher's class must be observed, and others permit school boards to design their own procedures. Evaluation requirements for probationary teachers are often more extensive than for tenured teachers. Some states require each school district to design a teacher evaluation plan within the boundaries set by state law and to submit the plan to the state board of education. Many school districts' collective bargaining agreements also regulate the evaluation of teachers, both probationary and tenured.

School boards annually face the question of whether to renew the contract of probationary teachers and, ultimately, whether to grant tenure. Until recently, these decisions were not subject to many procedural requirements. All states' statutes drew a sharp distinction between the procedures required for a nonrenewal decision and a decision to dismiss for cause. This distinction still exists in many states. In those states, school boards may decide not to rehire a probationary teacher for any constitutionally permissible reason. Statutes generally require only that the teacher be notified by a specified date of the decision not to renew. No hearing or other due process is required by either state statute or the Constitution (see sec. 10.5). State courts are split on the question whether a probationary teacher automatically achieves tenure if the school board fails to notify the teacher by the specified date.[21] However, today, almost half the states require that any teacher, tenured or not, whose contract is not to be renewed be given a statement of reasons as well as other significant procedural protections.[22] Failure to follow these procedures could result in the teacher automatically obtaining tenure by default.[23]

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[17] Candelori v. Board of Educ. of New Britain, 428 A.2d 331 (Conn. 1980).

[18] State *ex rel.* McKenna v. District No. 8, 10 N.W.2d 155 (Wis. 1943).

[19] Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

[20] Lambert v. Board of Educ. of Middle Country Cent. Sch. Dist., 664 N.Y.S.2d 422 (Sup. Ct. 1997). *See also*, Conetta v. Board of Educ. of Patchogue, 629 N.Y.S.2d 640 (Sup. Ct. 1995).

An Ohio statute illustrates the procedural rights probationary teachers now enjoy in many states. In the year prior to nonrenewal, a probationary teacher must be evaluated twice. Each evaluation must be based on two thirty-minute observations and specific criteria regarding expected job performance in the teacher's field. A required written report on the evaluation must contain recommendations for improvement regarding any deficiencies noted. The board must notify the teacher by April 30 of its intention not to renew. The teacher may demand a hearing. If the hearing affirms the decision not to renew, the decision may be appealed to a court, but the court's review is limited to determining whether the board complied with the statutory procedures. The court may not review the grounds for nonrenewal.[24]

Thus, even in states where nonrenewal of probationary teachers requires due process, boards still retain considerable discretion. The Rhode Island Supreme Court upheld a rule that said that probationary teachers who missed twenty-seven days or more during any one of their three probationary years would not be renewed or granted tenure.[25] The law even permits a school board not to renew a teacher's contract simply on the grounds that it believes a better teacher could be found. The teacher's only recourse is to prove that the decision not to renew violated a constitutional or statutory right (e.g., that the nonrenewal occurred because of race, religion, age, or other discriminatory reasons). Probationary teachers dismissed during a contract year as opposed to nonrenewal at the end of a contract year receive the same due process protection as tenured teachers.

10.4 DISMISSAL FOR CAUSE

The contract of a postprobationary or tenured teacher must be renewed from year to year unless the teacher is dismissed for cause. State statutes protect tenured teachers by limiting the permissible grounds for dismissal. Tenured teachers may not be dismissed for engaging in constitutionally or statutorily protected behavior or because the school board believes that a better teacher could be found or even if a better teacher is found. When dismissing a tenured teacher, the school board bears the burden of showing by substantial evidence that it has statutory grounds for dismissal. Many states also require that teachers be given the opportunity to remediate their deficiencies prior to dismissal. Dismissal is allowed only if remediation fails or if there is a finding of irremediability.[26] Failures in maintaining classroom discipline or performance of instructional duties are typically viewed as remedial, but serious misconduct that may do permanent harm, such as having sex with students, is not.[27]

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[21] *Cases granting tenure*: Harrodsburg Bd. of Educ. v. Powell, 792 S.W.2d 376 (Ky. Ct. App. 1990); Day v. Prowers County Sch. Dist. RE-1, 725 P.2d 14 (Colo. Ct. App. 1986); Fucinari v. Dearborn Bd. of Educ., 188 N.W.2d 229 (Mich. Ct. App. 1971). *Contra*, Bessler v. Board of Educ. of Chartered Sch. Dist., 356 N.E.2d 1253 (Ill. App. Ct. 1976), *modified*, 370 N.E.2d 1050 (Ill. 1977); Snell v. Brothers, 527 S.W.2d 114 (Tenn. 1975).

[22] State v. Board of Educ. of South Point, 339 N.E.2d 249 (Ohio 1975); Hedrick v. Board of Educ., 332 S.E.2d 109 (W.Va. 1985).

[23] Farrington v. School Comm. of Cambridge, 415 N.E.2d 211 (Mass. 1981).

[24] Ohio Rev. Code Ann. § 3319.111.

[25] Asadoorian v. Warwick Sch. Comm., 691 A.2d 573 (R.I. 1997).

Although wording varies, statutory grounds for dismissal can be grouped into five general categories. Each category has been given a descriptive label, which may differ from the terms actually used in state statutes. None of these grounds is precisely defined in statute or case law, and each has been the issue in a significant amount of litigation.

Incompetence: grounds relating to expertise as a teacher. Some instances of incompetence may be referred to as "unprofessional conduct" or "inefficiency" in the statutes of some states. Factors such as a lack of knowledge of the subject matter; inability or failure to impart the designated curriculum; failure to work effectively with colleagues, supervisors, and parents; and failure to maintain adequate discipline or to supervise students have been recognized as indicative of incompetence. One court upheld the dismissal of a teacher whose students were disruptive, daydreamed, and left class without permission.[28] Another case permitted dismissal of a teacher whose classroom was filthy and who failed to plan lessons or keep order.[29] The Connecticut Supreme Court allowed the dismissal of a teacher who was competent in one of the two subject areas that she taught but incompetent in the other.[30]

Sometimes the issue arises whether a teacher can be found incompetent for one instance of what the school board considers to be a serious instructional mistake. For example, a South Dakota case challenged the dismissal of a teacher for frankly answering a student's question about homosexuality. In disallowing the dismissal, the Supreme Court of South Dakota emphasized that incompetence usually must involve a pattern or course of conduct displaying

> a habitual failure to perform work with the degree of skill or accuracy displayed by other persons. . . . Nevertheless, there are times when only one incident may be of such magnitude or of such far reaching consequences that a teacher's ability to perform his or her duties will be permanently impaired and a finding of "incompetence" would be proper.

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[26] Gilliland v. Board of Educ. of Pleasant View, 365 N.E.2d 322 (Ill. 1977).

[27] Grissom v. Board of Educ. of Buckley-Loda Community Sch. Dist. No. 8, 388 N.E.2d 398 (Ill. 1979); Weissman v. Board of Educ. of Jefferson County Sch. Dist. No. R-1, 547 P.2d 1267 (Colo. 1976) (en banc).

[28] Board of Dir. of Sioux City v. Mroz, 295 N.W.2d 447 (Iowa 1980).

[29] Board of Educ. of Phila. v. Kushner, 530 A.2d 541 (Pa. 1987).

[30] Sekor v. Board of Educ. of Ridgefield, 689 A.2d 1112 (Conn. 1997).

In this case, however, there was no showing that the teacher's ability to teach had been impaired or that students were detrimentally affected. The court also concluded that it was unlikely the teacher would make the same mistake again.[31]

Under certain circumstances, poor performance by a teacher's students may support a finding of incompetence.[32] However, in one case, a teacher who was unable to establish rapport with his students was found not incompetent.[33] In some states, teaching out of certificate is proof of incompetence.[34]

School citizenship: grounds relating to in-school behavior and performance of duties other than actual teaching. Some instances may be referred to as "insubordination" or "neglect of duty" in the statutes of some states. Insubordination refers usually to willful, but sometimes even to inadvertent, disobedience either to an officially adopted school rule or to the legitimate order of a supervisor. In one case, the firing of a teacher who refused to execute normal duties associated with a teaching position such as going to faculty meetings and meeting with parents was allowed.[35] However, a Kentucky court held that a teacher could not be dismissed for insubordination when merely charged with having failed to "cooperate" with the principal. To prove insubordination the school had to point to a refusal on the part of the teacher to follow a specific school rule or a specific order.[36] Teachers may not be dismissed for disobedience when the school rule or order violates their constitutional or statutory rights or the order was beyond the authority of the person issuing it. Thus, the Supreme Court ruled that the dismissal of a competent teacher for publicly criticizing the school board's budgetary policies was an impermissible violation of the teacher's right of free speech.[37]

To find a teacher insubordinate, it is not necessary to prove a pattern of behavior; a single instance may suffice. For example, a Pennsylvania teacher was dismissed for using sick leave to take a skiing vacation.[38] Teachers may also be dismissed, usually on grounds of immorality, for lying about their use of sick leave.[39] Refusal to take a new teaching assignment is insubordination[40] as is violating rules against using corporal punishment[41] or employing certain teaching materials.[42] Acts of academic dishonesty such as helping students cheat on tests or obtain a diploma under false pretenses are also generally upheld as causes of dismissal.[43] However, some courts will not permit dismissal for minor acts of disobedience that result in no harm to the school.[44]

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[31] Collins v. Faith Sch. Dist. No. 46-2, 574 N.W.2d 889 (S.D. 1998).

[32] *In re* Proposed Termination of James E. Johnson 451 N.W.2d 343 (Minn. 1990); Whaley v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 325 N.W.2d 128 (Minn. 1982).

[33] Powell v. Board of Trustees of Crook County Sch. Dist. No. 1, 550 P.2d 1112 (Wyo. 1976).

[34] Chambers v. Board of Educ. of Lisbon Central Sch. Dist., 391 N.E.2d 1270 (N.Y. 1979).

[35] Meckley v. Kanawha County Bd. of Educ., 383 S.E.2d 839 (W.Va. 1989).

[36] Osborne v. Bullitt County Bd. of Educ., 415 S.W.2d 607 (Ky. Ct. App. 1967).

[37] Pickering v. Board of Educ., 391 U.S. 563 (1968). *See*, sec. 9.1.

[38] Riverview Sch. Dist. v. Riverview Educ. Ass'n, 639 A.2d 974 (Pa. Cmwlth. Ct. 1994).

[39] Bethel Park Sch. Dist. v. Krall, 445 A.2d 1377 (Pa. Cmwlth. Ct. 1982).

[40] Thomas v. Mahan, 886 S.W.2d 199 (Mo. App. 1994).

[41] Fisher v. Fairbanks North Star Borough Sch. Dist., 704 P.2d 213 (Alaska 1985).

[42] Ware v. Morgan County Sch. Dist. No. RE-3, 748 P.2d 1295 (Colo. 1988) (en banc).

[43] Carangelo v. Ambach, 515 N.Y.S.2d 665 (App. Div. 1987).

Incapacity: grounds relating to mental or physical inability of the teacher to perform the job (but see sec. 9.6 on employment of the disabled). In some instances, incapacity may be referred to as "unfitness" or "neglect of duty." One case upheld the firing of a teacher with a severe personality disorder;[45] however, another court blocked dismissal of a teacher suffering from temporary mental illness.[46]

Role model: grounds relating to the teacher as an example for students. Some instances may be referred to as "immorality," "conduct unbecoming" a teacher, or "unfitness" in the statutes of some states. Cases in this category are of three types: teachers convicted or accused of violating a criminal law, teachers engaging in noncriminal extramarital sex, and teachers committing other noncriminal acts condemned by the school board such as lying.

In general, any serious criminal behavior is grounds for dismissal, especially if it involves violence[47] or theft. Courts have permitted the dismissal of teachers convicted of theft, welfare fraud, income tax evasion, mail fraud, and sometimes even shoplifting.[48] Other cases have supported teacher dismissals for public intoxication and fighting, and driving under the influence of alcohol.[49] Teachers caught possessing illegal drugs or growing marijuana have also been subject to dismissal.[50] In Missouri, a teacher was successfully dismissed following an arrest for indecent exposure for masturbating in a public restroom, exposing himself, and making a homosexual advance to an undercover policeman.[51]

Despite these cases, many courts do not permit dismissal for a nonviolent or relatively minor crime unless the school board can establish a connection between the criminal behavior and teaching effectiveness. The West Virginia Supreme Court has ruled that in order for a teacher to be fired for any act committed away from the job, either the conduct must have directly affected the teacher's job performance or the notoriety surrounding the teacher's conduct must have significantly affected the teacher's ability to perform teaching duties. In the latter case, the notoriety must have been caused by the act itself, not the school board's consideration of the act.[52] Other courts have adopted positions similar to West Virginia's. A Washington state court disallowed the dismissal of a teacher convicted of grand larceny for purchasing a stolen motorcycle, stating that "simply labeling an instructor a convicted felon will not justify a discharge."[53] An Ohio court protected a teacher from dismissal even though he had been convicted of leaving the scene of a traffic accident.[54] A Montana court ruled that a teacher who had been found guilty three times of driving under the influence could not be dismissed because his crime was not "tantamount to immorality" and there was no proof that the convictions affected his performance as a teacher.[55]

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[44] Rust v. Clark County Sch. Dist., 683 P.2d 23 (Nev. 1984).

[45] Fitzpatrick v. Board of Educ. of Mamaroneck, 465 N.Y.S.2d 240 (App. Div. 1983).

[46] Smith v. Board of Educ. of Fort Madison, 293 N.W.2d 221 (Iowa 1980).

[47] *In re* Thomas, 926 S.W.2d 163 (Mo. Ct. App. 1996); Skripchuk v. Austin, 379 A.2d 1142 (Del. Super. Ct. 1977).

[48] Board of Dir. of Lawton-Bronson v. Davies, 489 N.W.2d 19 (Iowa 1992); Startzel v. Commonwealth, Dep't of Educ., 562 A.2d 1005 (Pa. Cmwlth. Ct. 1989); *In re* Shelton, 408 N.W.2d 594 (Minn. Ct. App. 1987); Perryman v. School Comm. of Boston, 458 N.E.2d 748 (Mass. App. Ct. 1983); Logan v. Warren County Bd. of Educ., 549 F. Supp. 145 (S.D. Ga. 1982).

[49] Watson v. State Bd. of Educ., 99 Cal. Rptr. 468 (Ct. App. 1971); Williams v. School Dist. No. 40 of Gila County, 417 P.2d 376 (Ariz. Ct. App. 1966); Scott v. Board of Educ. of Alton, 156 N.E.2d 1 (Ill. App. Ct. 1959).

[50] Chicago Bd. of Educ. v. Payne, 430 N.E.2d 310 (Ill. App. Ct. 1981); Adams v. State Prof'l Practices Council, 406 So. 2d 1170 (Fla. App. 1981); Dominy v. Mays, 257 S.E.2d 317 (Ga. Ct. App. 1979).

[51] C.F.S. v. Mahan, 934 S.W.2d 615 (Mo. Ct. App. 1996).

[52] Golden v. Board of Educ., 285 S.E.2d 665 (W.Va. 1982).

Dismissals for noncriminal sexual conduct raise both the statutory issues considered here and the constitutional issues considered in sec. 9.3. Some cases have rejected statutory challenges to dismissals for noncriminal sexual conduct. For example, a tenured elementary school teacher was successfully dismissed for immorality following her arrest for openly engaging in sexual activities with three men at a "swinger's club."[56] Other cases have upheld the dismissal of teachers for engaging in homosexual acts in public.[57] In 1975, the highest state court of Washington concluded that being gay was grounds for dismissal under state statutory law. The court permitted dismissal for immorality of a teacher who admitted to homosexual feelings in the absence of any evidence of homosexual behavior.[58] It is questionable whether many courts would take this position today.[59]

In another case, the California Supreme Court ruled that state law did not permit revocation of the certificate of a teacher who had engaged in homosexual sex with a consenting adult many years earlier. The court said that certificate revocation would be warranted only if the teacher posed a significant danger to either students or school employees or if there were a proven connection between the teacher's conduct and the teacher's effectiveness.[60] Other courts have taken a similar approach, rejecting dismissal and certificate revocation for consensual unwed sex and for notorious adultery in a disapproving community.[61] Federal law does not permit dismissal of unwed mothers on grounds of immorality or being a bad role model for students.[62]

Lying to school officials might sometimes be the basis for a finding of immorality. In one case, a tenured teacher who had been denied permission to attend a conference went anyway and upon returning submitted a request for an excused absence based on illness. The court upheld the dismissal of the teacher saying that immoral behavior was not limited to sexual conduct.[63] However, in another case, the court ruled that a teacher could not be dismissed for writing two letters to a recently graduated student, letters that the court said contained gross, vulgar, and offensive language. The court could find no connection between these private letters and the teacher's fitness to teach.[64]

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[53] Hoagland v. Mount Vernon Sch. Dist. No. 320, 623 P.2d 1156 (Wash. 1981).

[54] Hale v. Board of Educ. of Lancaster, 234 N.E.2d 583 (Ohio 1968).

[55] Lindgren v. Board of Trustees, High Sch. Dist. No. 1, 558 P.2d 468 (Mont. 1976).

[56] Pettit v. State Bd. of Educ., 513 P.2d 889 (Cal. 1973). *See also*, Board of Educ. v. Calderon, 110 Cal. Rptr. 916 (Ct. App. 1973).

[57] Sarac v. State Bd. of Educ., 57 Cal. Rptr. 69 (Ct. App. 1967); Stephens v. Board of Educ., Sch. Dist. No. 5, 429 N.W.2d 722 (Neb. 1988).

[58] Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340 (Wash. Ct. App.), *aff'd*, 535 P.2d 804 (Wash. 1975) (en banc).

[59] Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

[60] Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969).

[61] Sherbourne v. School Bd. of Suwannee County, 455 So. 2d 1057 (Fla. App. 1984); Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W.2d 339 (Iowa 1974).

[62] Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (Former 5th Cir. 1982); Andrews v. Drew Mun. Separate Sch. Dist., 507 F.2d 611 (5th Cir.), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed*, 425 U.S. 559 (1976).

In general then, despite some cases to the contrary, most courts insist that school boards wishing to fire teachers for immorality demonstrate a connection between the allegedly immoral conduct and teaching effectiveness. If the teacher has committed a serious crime involving violence or a significant theft, a connection—that the teacher's presence in the school poses a danger to persons or property—may be assumed. For less serious crimes, the connection must be established affirmatively. If the alleged connection is that notoriety surrounding the teacher's conduct has led to loss of respect with students or community members, the notoriety must have occurred as a result of the conduct itself and not because the board publicized the conduct.

Posing a threat to pupils. Teacher behavior that harms or endangers students may be referred to as "immorality," "unprofessional conduct," or "unfitness to teach" in the statutes of some states. Drinking or using drugs[65] or engaging in illegal, dangerous, or reckless behavior with students is grounds for dismissal as is the physical or verbal abuse of students.

Teachers may be dismissed for subjecting students to vulgar or racial invective in or out of class.[66] Inappropriate classroom commentary may also be dangerous enough to justify dismissing a teacher. One twelfth-grade teacher was dismissed for explaining the operation of houses of prostitution including minimum age requirements for admission, discussing the size of a penis, and telling stories about intercourse with virgins and sex with a cow.[67] An Iowa court upheld the dismissal of a ninth-grade English teacher who used sarcasm with his students and said to one student who had written a paper on suicide that "for extra credit why don't you try it."[68]

Dismissal of teachers who have sex with minors is always upheld. It does not matter whether the minor was currently enrolled in the teacher's school or even in the same school district. Thus, the Maine Supreme Court upheld the dismissal of an elementary teacher who had sexual intercourse with a fifteen-year-old even though she and the boy did not live in the town where she taught.[69] Nor does it matter if the sexual relationship took place prior to the teacher's current employment. When a twenty-three-year-old man established that his former elementary school teacher had sexually abused him many years before, the teacher's dismissal was allowed.[70] Another case upheld the dismissal of a teacher twelve years after having a sexual relationship with a fifteen-year-old student while employed in another school district.[71] There is some question as to whether a legal sexual relationship with a student, that is a consensual relationship with a student who had reached the legal age of consent, is cause for dismissal. Dismissal would almost surely be upheld if the student attended the same school where the teacher taught.

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[63] Bethel Park Sch. Dist. v. Krall, 445 A.2d 1377 (Pa. Cmwlth. Ct. 1982).

[64] Jarvella v. Willoughby-East Lake City Sch. Dist., 233 N.E.2d 143 (Ohio 1967).

[65] Board of Educ. of Hopkins County v. Wood, 717 S.W.2d 837 (Ky. 1986).

[66] Ware v. Morgan County Sch. Dist., 748 P.2d 1295 (Colo. 1988); Bovino v. Board of Sch. Dir. of the Indiana Area Sch. Dist., 377 A.2d 1284 (Pa. 1977); Clarke v. Board of Educ. of Omaha, 338 N.W.2d 272 (Neb. 1983).

[67] State v. Board of Sch. Dir. of Milwaukee, 111 N.W.2d 198 (Wis. 1961), *appeal dismissed*, 370 U.S. 720 (1962).

[68] School Dist. Bd. of Dir. v. Lundblad, 528 N.W.2d 593 (Iowa 1995).

[69] Elvin v. City of Waterville, 573 A.2d 381 (Me. 1990).

Dismissal of teachers who engage in sex with minors is not only permissible, but may be legally prudent or even mandatory in some cases. School districts that hire or retain teachers with a history of sexual relationships with minors may be vulnerable to lawsuits for negligent hiring if the behavior is repeated (see sec. 12.5). School districts that fail to act on instances of sexual involvement between teachers and students, even involvement that falls short of sexual intercourse, may be vulnerable to lawsuits under Title IX (see sec. 6.8). However, schools must be careful to differentiate between sexual abuse and harassment and well-intentioned, nonsexual touching (see *Youngman v. Doerhoff* case later in this section).

A case for dismissal becomes stronger when it contains any of the following elements: documented observations of the teacher according to a formalized and properly followed evaluation procedure, establishment of a connection between the behavior and teaching effectiveness in the classroom, evidence of incompetence or other grounds based on more than the subjective evaluation by a single school official (subjective impressions may be part of a properly executed evaluation[72]), proof that formal steps of remediation were undertaken and failed, proof that the teacher's behavior undermined the educational goals of the school, evidence of specific harms or disruption of the school's educational mission, proof of the violation of a written school rule or policy, establishment of a pattern of offending behavior, evidence of notices and warnings provided to the teacher, absence of any sound educational justification for the teacher's behavior, evidence of notoriety over the teachers behavior diminishing the school's or teacher's effectiveness (but not notoriety resulting primarily from the school board's actions), absence of mitigating circumstances explaining or excusing the teacher's behavior, or evidence that the continuing presence of the teacher in the school poses an educational or physical risk to the students.

The testimony of students may be used in making a case for dismissal, as may the results of a polygraph test.[73] A California court has ruled that even illegally obtained evidence—evidence that could not be used in a criminal proceeding against the teacher—may be used in a dismissal proceeding.[74] Some courts may exclude hearsay evidence from teacher dismissal hearings or require that hearsay be given very little weight.[75]

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[70] Fisher v. Independent Sch. Dist. No. 622, 357 N.W.2d 152 (Minn. Ct. App. 1984).
[71] Toney v. Fairbanks North Star Borough Sch. Dist., 881 P.2d 1112 (Ala. 1994).
[72] Iverson v. Wall Bd. of Educ., 522 N.W.2d 188 (S.D. 1994).
[73] Libe v. Board of Educ. of Twin Cedars, 350 N.W.2d 748 (Iowa Ct. App. 1984).
[74] Governing Bd. of Mountain View Sch. Dist. v. Metcalf, 111 Cal. Rptr. 724 (Ct. App. 1974).
[75] *See*, Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. App. 1994).

Few things can diminish a school's effectiveness more than a teacher who cannot perform adequately; yet, far fewer teachers are actually dismissed than are considered incompetent by their supervisors. Reasons for the discrepancy include reluctance to cause harm to the incompetent person, fear of litigation or other unpleasant repercussions, and the belief that incompetence can more easily be dealt with through other methods such as forced resignation. The latter approach—forcing resignation by making working conditions intolerable—is known as "constructive discharge." Although it may be desirable to give an unsatisfactory employee the opportunity to resign before instituting formal proceedings, courts often view constructive discharge as a violation of due process. Employees who voluntarily resign will usually find courts unsympathetic if they try to rescind their action unless they can show a significant degree of coercion.

Whereas failing to fire an incompetent teacher rarely results in litigation, dismissals for constitutionally or statutorily impermissible reasons often do. Typically these cases arise when administrators act out of anger or personal animosity toward a teacher, in the face of community pressure, or when the teacher lives an unorthodox lifestyle. School officials serve their students, teachers, and community best and are far less likely to find themselves on the losing side of a lawsuit when they act on the basis of professional standards and statutory requirements and not out of personal pique or political pressure.

The following cases illustrate the principles discussed in this section.

IN RE PROPOSED TERMINATION OF JAMES E. JOHNSON

Court of Appeals of Minnesota, 1990
451 N.W.2d 343

Gardebring, Judge.

The school board passed a resolution terminating the employment of James Johnson, a tenured teacher, based upon the independent hearing examiner's findings of inefficiency in teaching and insubordination. Johnson appeals, contesting the sufficiency of the evidence to terminate his employment and the propriety of the procedures followed by the school in conducting its investigation. We affirm.

FACTS

Prior to his termination, relator James Johnson was a tenured mathematics teacher employed by respondent Independent School District No. 709 (Duluth) since 1967. He taught seventh and ninth grade math at several schools within the school district. Beginning in 1970, he received intermittent performance evaluations, both formal and informal, some negative and some rating his teaching ability as satisfactory or better. In general, the evaluations noted four areas of concern: excessive failure rates, high volume of transfer requests, poor relationships with students and parents, and inappropriate teaching methods. In some instances, specific instructions were provided to Johnson as to required changes in classroom practice and teaching methodology.

On September 17, 1987, Johnson received a letter from Richard Wallin, Director of Secondary Education, outlining various directions Johnson must follow to improve his teaching performance. Another letter followed on October 26, 1987, summarizing the district's concerns and providing specific examples of misconduct or of suggestions to improve in each area. On November 30, 1987, Wallin notified Johnson of his intent to recommend termination of employment and the grounds therefor. Johnson returned a written response.

On January 13, 1988, Johnson was charged with inefficiency in teaching, conduct unbecoming a teacher, and insubordination, and was suspended without pay, effective immediately. The charges outlined the following deficiencies: (1) poor rapport with students; (2) insufficient communications with parents; (3) lack of student progress; (4) inappropriate use of class time; and (5) failure to follow the school's adopted mathematics curriculum. A hearing was conducted before an independent hearing examiner, a retired district court judge. The hearing lasted 29 days over a seven-week period in September and October 1988. On May 11, 1989, the hearing examiner issued his findings and concluded that while there were insufficient grounds for terminating on the basis of conduct unbecoming a teacher, there was substantial evidence to recommend termination for insubordination and inefficiency in teaching. On May 31, 1989, the school board adopted the examiner's recommendations and immediately terminated Johnson's employment.

ISSUE

Is the school board's decision to terminate Johnson supported by substantial evidence?

ANALYSIS

A school board's decision to terminate a teacher will not be set aside on appeal unless the decision is fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the record, not within the school board's jurisdiction or is based on an erroneous theory of law. Johnson appeals the school board's decision citing lack of substantial evidence to terminate. The standard of review is narrow. We must view the record in its entirety to determine whether the board's findings are supported by relevant evidence which a reasonable mind might accept as adequate to support the conclusion that Johnson was insubordinate and inefficient in his teaching methods.

This matter was extensively heard by the hearing examiner. Eighty-three witnesses were called and 157 exhibits were received in evidence. The transcript of the proceedings consists of 29 volumes containing 6455 pages. The hearing examiner had ample opportunity to weigh the evidence and the credibility of the witnesses. He made detailed findings and concluded there were sufficient grounds for recommending termination. The school board considered the hearing examiner's findings and recommendation, and heard arguments by the school district and Johnson before deciding to terminate Johnson's employment.

Inefficiency in teaching and insubordination are two independent statutory grounds for termination. Although there is evidence in the record from which conflicting inferences may be drawn with regard to each deficiency, the critical inquiry is whether the inferences drawn by the school board in the course of their decision to terminate Johnson are supported by substantial evidence in the record considered as a whole. We find that there is substantial evidence in the record to support the school board's decision to terminate Johnson's employment.

Inefficiency in Teaching

Evidence in the record demonstrates Johnson's poor rapport with students and insufficient communication with parents. The administration received numerous complaints from students and parents wherein the students describe feelings of frustration and confusion regarding Johnson's teaching methods and class assignments. Many of these complaints were accompanied by requests for transfer out of Johnson's class. Administrators observing Johnson's classes between 1977 and 1988 repeatedly noted the poor communication between Johnson and his students.

The record also contains evidence substantiating the charge of lack of student progress. Even judged by his own techniques, the evidence supports the finding that Johnson's students were not progressing satisfactorily. Although the test scores of highly motivated students improved, the scores of the other students remained the same or worsened. Many students failed his examinations. Testimony by the math teacher who took over Johnson's class after his suspension reveals that Johnson's students were behind in the curriculum. While evidence of requests by students and parents for transfer out of Johnson's classes are not indicative of poor teaching, it demonstrates a pattern of dissatisfaction with Johnson's teaching methods which is a proper area of concern for the school board to address.

Furthermore, the district's attention to Johnson's grading practices and failure rates was appropriate, and evidence on these issues supports the finding of teaching inefficiency. While Johnson has argued that he should not be evaluated on the attitudes of his students and their unwillingness to learn, evidence on grades, and in particular the large number of student failures, provides evidence of Johnson's inability to teach the mandated curriculum.

Although the assignment of a grade may be entitled to first amendment protection; academic freedom is not absolute. Johnson was responsible for transmitting basic information to secondary school students. The district adopted a specific curriculum for achieving this objective. Johnson was terminated due to an inability to impart this basic knowledge, not because of the specific grades he assigned. We find no grounds to support Johnson's claim that his right to academic freedom was violated.

We note, however, that the school district's September 1987 directive to Johnson that his grade distribution not deviate by more than two percent from distributions in other similar classes was inappropriate. Such a rigid, numerical grading standard appears to us to potentially interfere with a teacher's legitimate need for classroom flexibility. School districts are cautioned in this area.

In reviewing the entire record, we conclude there is substantial evidence supporting the finding that Johnson was inefficient in teaching.

Insubordination

Insubordination is a "constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority." Johnson was specifically directed by Wallin and school principals to improve his relationship and rapport with students and parents. He was ordered to provide worksheets containing the assigned problems instead of having the students copy the problems off the blackboard. He was also directed to furnish each student with copies of tests and any material used to supplement the textbook.

In light of the numerous complaints received by the administrators, these orders are reasonable. Although Johnson participated in several teaching workshops, he continually refused to change his instructional methods. The record contains substantial evidence to support the finding of insubordination.

Propriety of Procedures

Johnson claims that the school board failed to follow proper procedures in conducting the termination hearing. He contends he was denied remediation, due process, and adequate notice of charges. Furthermore, he argues that the board violated the Minnesota Data Practices Act and wrongfully assessed hearing costs against him.

Johnson's contention that he was denied remediation is without merit. The opportunity for remediation is not required in Duluth, a city of the first class. Similarly, we find Johnson's claim that he was denied due process unsupported by the record. The hearing examiner conducted an extensive hearing and made detailed findings. There is no evidence that school board members were predisposed to terminating Johnson's employment. Furthermore, statements made by counsel at the school board meeting regarding arguments by counsel and Johnson not constituting evidence were accurate and, as such, cannot be found to violate due process.

We find that the charges, consisting of three pages outlining the specific allegations, were sufficiently definite to permit Johnson to prepare a proper defense.

DECISION

Based upon the entire record, we find there is substantial evidence to support the school board's decision to terminate Johnson's employment.

Affirmed.

* * *

YOUNGMAN v. DOERHOFF

Missouri Court of Appeals, 1994

890 S.W.2d 330

CRAHAN, Judge.

Ronald V. Youngman ("Teacher") appeals his dismissal as a permanent teacher by the Board of Education, Gasconade County R-1 School District ("Board") based on its determination that he had engaged in "immoral conduct." Teacher claims that the Board's determination is based on findings that are not supported by competent and substantial evidence, go beyond the specific charges which were the subject of the hearing, and do not, as a matter of law, support the ultimate finding of "immoral conduct" as specified in § 168.114.1(2) RSMo 1986.* We reverse and remand.

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*The circuit court affirmed Teacher's dismissal. We review the findings and decision of the Board rather than the judgment of the circuit court.

Procedural History

The charge served upon Teacher was set forth in a letter dated March 22, 1993 from the District Superintendent as follows:

> You, acting as a teacher, at school, during the school day on Tuesday, March 16, 1993 did approach a male student at the Hermann Middle School, hug him, rub his back, and proceed to kiss him. This appears not to be an isolated incident, and appears to be unsolicited.

The Superintendent's letter stated that this incident "could be considered to be abuse and indicates physical or mental condition unfitting of yourself to instruct or associate with children, and/or immoral conduct under the circumstance [sic] of the incidents, as outlined in 168.114 RSMo."** The letter stated that Teacher was suspended with pay, instructed him to stay away from the school during regular school hours and advised him of his right to a hearing before the Board.

Teacher made a timely request for a public hearing, which was conducted as provided in § 168.118. Following the hearing, the Board met in closed session at which it adopted findings of fact and conclusions of law culminating in a conclusion that Teacher had engaged in immoral conduct justifying his termination pursuant to § 168.114.1(2). . . .

Summary of the Evidence

The evidence discloses that at the time of the incidents in question, C.C. was a fourteen year old, eighth grade student at the middle school in Hermann, Missouri. C.C. began attending the school in November, 1992. C.C. had been previously diagnosed with a conduct or behavior disorder and was receiving counseling at the school for disciplinary problems. C.C.'s student file reflects a history of physical abuse by his father and periods of foster care. In Hermann, C.C. was living with his mother and brother but apparently had difficulty in bonding with his family. Although living with his mother, C.C. was also under the supervision of the juvenile authorities. Regular meetings were held between C.C.'s mother, juvenile authorities and school administrative and guidance personnel to discuss C.C.'s disciplinary problems.

Teacher has taught language arts for more than twenty years and had been at the Hermann Middle School teaching seventh and eighth grade students for nearly fifteen years. Colleagues testified that he was one of the most popular teachers at the middle school.

C.C. was a student in Teacher's language arts class. Although Teacher was aware that C.C. was receiving counseling for his disciplinary problems, he was neither directly involved in evaluation or treatment of these problems nor informed of the exact nature of C.C.'s condition.

At about noon on March 16, 1993, C.C. was walking down a hall near the cafeteria as Teacher emerged from the cafeteria. C.C. had been to the office because he wasn't feeling well. Teacher asked C.C. what was wrong and he replied that he "wasn't feeling good." According to C.C., Teacher said "Me either" and then said "Well, [C.C.], give me a hug." Teacher then hugged C.C. and rubbed his lower back. According to C.C., he just stood there and did not respond to Teacher's hug. As Teacher hugged him, Teacher kissed him twice on the neck. Then Teacher said "It's okay [C.C.], because we're going to get through this together." Teacher then left and C.C. went to lunch. Teacher's version of the incident differed only slightly from C.C.'s. Teacher stated that the incident occurred in a hallway nearer the classroom, that C.C. was teary-eyed and that Teacher had asked if C.C. wanted a hug before he did so.

C.C. testified that he was "shocked" and that Teacher's behavior made him "very uncomfortable" because "nobody that's even close to me like relatives or anything would kiss me on the neck." C.C. felt as if Teacher was "making a pass."

**All statutory references are to RSMo 1986 unless otherwise indicated. Section 168.114 provides, in part:

> **168.114 Board may terminate, grounds for.** –1. An indefinite contract with a permanent teacher shall not be terminated by the board of education of a school district except for one or more of the following causes:
> (1) Physical or mental condition unfitting him to instruct or associate with children;
> (2) Immoral conduct;
> . . .

Although the Superintendent's letter appears to charge a violation of both subsections (1) and (2), the Board made no finding that Teacher suffered from any physical or mental condition unfitting him to instruct or associate with children and based its determination solely on § 168.114.1(2). Nor, in our view, was there any competent and substantial evidence to support a finding under subsection (1). Accordingly, we will limit our discussion to the Board's finding of "immoral conduct" as set forth in § 168.114.1(2).

After lunch, C.C. went to Teacher and got permission to go back to the office because he still wasn't feeling well. The guidance counselor took him home. C.C. did not attend school the next day because he went to St. Louis for some previously scheduled testing.

The following day, March 18, 1993, C.C. saw the principal, Mr. Combs, before school and asked him if he could go to in-school suspension (ISS). As part of the individualized program for dealing with C.C.'s behavior problems, C.C. was permitted to go to the ISS room whenever he felt he was having problems. Later in the day, Mr. Combs asked C.C. why he wanted to be in ISS that day. C.C. said it was because he didn't want to go to Teacher's class. Mr. Combs suggested there were other ways they might have worked around that and then asked why C.C. didn't want to be in Teacher's class. C.C. replied that Teacher had hugged him and kissed him and related what had transpired on March 16.

Mr. Combs took C.C. to his office and admonished him that the matter was extremely serious and he should be very careful about what he said because there could be serious consequences and ramifications. Mr. Combs then had C.C. repeat the story. Mr. Combs then summoned Mr. Hamlett, the guidance counselor, and had C.C. relate the story again.

After sending C.C. from the room, Mr. Combs and Mr. Hamlett discussed the incident and decided to summon Mr. Doerhoff, the Superintendent of Schools for the district. When Mr. Doerhoff arrived, Mr. Combs had C.C. again relate what happened. Mr. Doerhoff asked C.C. to write it down and he did so. After conferring, Mr. Combs and Mr. Doerhoff decided they should talk with Teacher about the incident immediately after school.

At approximately 3:30 p.m. on the afternoon of March 18, Mr. Combs and Mr. Doerhoff met with Teacher in his classroom. Mr. Doerhoff told Teacher that a student, whom he did not name, had accused Teacher of approaching him in the hallway and hugging and kissing him. Teacher immediately recalled the situation, naming C.C. and the time and place of the incident. Mr. Doerhoff asked Teacher if it was an isolated occurrence and he replied that he had treated students that way repeatedly over his fifteen years at the school. Mr. Doerhoff asked if this was the only time he had treated C.C. that way and Teacher recalled that there had been at least one other occasion about two weeks prior to the incident in question. Mr. Doerhoff did not inquire into the details of the prior incident.

Mr. Doerhoff suggested to Teacher that his conduct toward C.C. could be misinterpreted and that C.C. did not perceive it as a friendly gesture. Teacher said that it certainly wasn't anything sexual and, according to Mr. Doerhoff, no one suggested that it was. Mr. Doerhoff instructed Teacher to refrain from any other physical contact with students and he agreed to do so.

On the following Monday, Mr. Doerhoff met with Teacher and delivered the letter described above, notifying him of the charges and suspending him from his teaching duties. No further discussion of the charges occurred at this meeting.

In his discussions with Messrs. Combs, Hamlett and Doerhoff, C.C. had not mentioned the prior incident mentioned by Teacher. So far as can be determined from the record before us, the first time C.C. was asked about the details of the prior incident was in a conversation with the Board's attorney prior to the hearing. On direct examination, C.C. testified that approximately two weeks prior to the March 16th incident, Teacher approached him as he was getting some books from his locker while the other students were in class. Teacher asked what he was doing and C.C. said, "Nothing, just getting stuff out of my locker." According to C.C., Teacher said, "Oh," gave him a hug, and kissed him on the forehead. C.C. testified that he was not upset by the incident and felt that Teacher was just being caring and concerned. Nevertheless, C.C. testified that he reported the incident to Ms. Grannemann, his "LBD" teacher, on the day it occurred and told her that, "if he ever tried it again, that I would do something about it." C.C. did not know if Ms. Grannemann reported the incident to anyone. C.C. felt that she may not have believed him.

Ms. Grannemann did not testify at the hearing and there is no indication that the details of the first incident were ever communicated to Mr. Combs or Mr. Doerhoff. Nor was there any evidence that Teacher was ever apprised of C.C.'s complaint to Ms. Grannemann about the first incident. Teacher testified that he was never so apprised. The charge that the March 16 incident "appears not to be an isolated incident" was based solely upon Teacher's statement to Messrs. Combs and Doerhoff on March 18 that he had treated students in the same way throughout his 15 years at the school and specifically recalled a similar encounter with C.C. about two weeks prior to March 16.

Mr. Combs testified that during his tenure as principal he had not received any complaints about Teacher prior to the March 16 incident. Although he did not think that kissing an eighth grade male student would generally be an appropriate gesture, he could not rule out situations or circumstances in which it might be appropriate. Mr. Combs testified that he was unaware of other teachers hugging or kissing students at the middle school.

Mr. Doerhoff testified that it was his decision to suspend Teacher, based on his interpretation that kissing a student at the middle school level was "completely inappropriate" for a teacher at school. Mr. Doerhoff further testified that hugging and kissing were not similar in his view. However, Mr. Doerhoff also testified that he did not consider hugging a student to be immoral conduct, nor did he believe that kissing a child was always an immoral act. Other than instructing Teacher to refrain from any physical contact with students at the conclusion of their meeting on March 18, Mr. Doerhoff had not issued any directives about physical contact between teachers and students at the middle school. Mr. Doerhoff was not aware of any other instances of teachers hugging students at the middle school.

Teacher and his brother testified that their family was a very physically demonstrative one which typically engaged in a great deal of hugging and kissing among males and females, children and adults alike. Teacher testified that, throughout his career he had occasionally put his hand on children's backs, patted their heads or hugged them. He said that when there was a great deal of sadness or children were upset, he might hug them or give them a peck on the cheek. He had no idea how many children he may have hugged or kissed over the course of his career. He engaged in such behavior only in an effort to comfort or assist the children and had never been advised that any children found his conduct offensive. Teacher also testified that prior principals had been aware he hugged children and that it had been encouraged.

Several of Teacher's colleagues testified that they had observed Teacher to be a physically demonstrative person and that it was not unusual to see him touching or putting his arm around students. None had observed him engage in any behavior they considered inappropriate. Several of the teachers testified that they, too, hugged children and observed other teachers do so. Two teachers testified that physical contact with students had been expressly encouraged at training sessions. One specifically recalled a slogan used in the training as, "It may be the only hug that child gets that day." Another recalled a speaker posing the question "Have you hugged a child or touched a child today?" Yet another teacher testified that during his evaluation, he was told he needed to work on a more positive attitude, accompanied by the observation that he "had never been seen with my arm around a student."

A classmate of C.C.'s testified concerning an incident in which C.C. had lost his temper due to a misunderstanding over some missing baseball cards. The classmate was upset and crying and Teacher comforted and reassured him with a hug. The student found the gesture comforting and said it relieved him. He did not feel threatened by Teacher's actions and had never witnessed him make any improper approaches to himself or anyone else. The student had also observed other teachers hug children on occasion.

Teacher testified that he hugged and kissed C.C. on March 16 in an effort to comfort him. According to Teacher, C.C. was teary-eyed and in obvious distress. Teacher had no indication that C.C. was offended by his actions. Had he been informed of C.C.'s reaction to the prior incident, he would have refrained from hugging him.

Teacher testified that he had never received any directions not to hug students at the middle school level. In fact, the principal, Mr. Combs, had told the teachers that he would rather have the middle school more like the elementary school when it came to responding to children. Teacher knew C.C. had a disciplinary problem but was never fully informed about his condition. Teacher indicated that he would be better able to assess what might make a child uncomfortable if he had access to such information. Teacher had never been advised of any district policy with regard to physical contact with students or that anyone felt his conduct was inappropriate. Teacher indicated his willingness to abide by district policy should he be informed of it.

Board's attorney also offered copies of C.C.'s and Teacher's school and district files, which were received under seal. Teacher did not object to the receipt of C.C.'s files or the written evaluations of Teacher contained in his files but objected to admission of the balance of his files on the ground that any materials in his file other than written evaluations were immaterial. The Board never specifically ruled on this objection at the hearing, although it later issued a statement included in the legal file that these exhibits would remain under seal and were accepted for review by the Board in making its decision.

Teacher offered a number of letters of support from former students as well as two petitions of support purporting to bear the signatures of a large number of current students and/or parents. Board's attorney objected that such materials were irrelevant but we can find no ruling on the offer or the objection in the record before us.

Board's Findings

At the conclusion of its deliberations, the Board issued the following findings of fact and conclusions of law:

1. Ron Youngman was a permanent teacher as of 3–16–93 at Gasconade County R–1 Middle School.
2. [C.C.] was a 14 year old student as of 3–16–93 at Gasconade County R–1 Middle School attending the class of Ron Youngman.
3. On 3–16–93, at the Gasconade County R–1 Middle School, Ron Youngman approached [C.C.] in the hallways and proceeded to hug, rub the back and kiss the neck of [C.C.].
4. [C.C.] interpreted the acts as a sexual advance or sexual harassment of himself and was offended by those acts, to the extent that he was afraid to return to the classroom of Ron Youngman.
5. On a prior occasion Ron Youngman approached [C.C.] in the Middle School of Gasconade County R–1 and proceeded to hug and kiss [C.C.].
6. On other prior occasions, Ron Youngman has kissed and hugged other students at Gasconade County R–1 Middle School.
7. Other students have reported to school officials being offended by the physical actions of Ron Youngman to his students.
8. Some students have expressed reluctance to report their fear or offensiveness of the physical actions of Ron Youngman.
9. Ron Youngman has been previously advised by the administration of the fear and offensiveness felt by some students of his physical actions toward students.
10. The collective actions of Ron Youngman on 3–16–93 in hugging, rubbing the back of, and kissing [C.C.] were inappropriate actions by a Middle School teacher to a 14 year old student.
11. The collective actions of Ron Youngman on 3–16–93 in hugging, rubbing the back, and kissing [C.C.] were reasonably perceived by the student as actions of sexual harassment.
12. The collective actions of Ron Youngman on 3–16–93 in hugging, rubbing the back, and kissing [C.C.] do not conform to the standards of this community.
13. The actions of Ron Youngman on 3–16–93 in hugging, rubbing the back of, and kissing [C.C.] were not solicited or welcomed by [C.C.].
14. The actions of Ron Youngman toward [C.C.] on 3–16–93 therefore amount to immoral conduct.
15. These collective actions of Ron Youngman toward [C.C.] make Ron Youngman unsuitable to teach and educate other students who may reasonably have a similar fear of the physical actions of Ron Youngman.
16. Because of a presence of fear by other students having been expressed, Ron Youngman is not suitable to teach and educate at the Gasconade County R–1 Middle School.
17. The actions of Ron Youngman are in violation of Section 168.114.1(2), RSMo, and he is therefore subject to termination pursuant to Chapter 168 RSMo.

    IT IS THEREFORE the decision of the Gasconade County R-1 School District Board of Education that the contract of Ron Youngman with the Gasconade County R-1 School District is herewith terminated and Ron Youngman is discharged as a permanent teacher therefrom.

Analysis

Teacher's contentions on appeal can be readily grouped into two categories: (1) challenges to the Board's findings pertaining to Teacher's alleged physical contacts with students other than C.C. (findings 7–9); and (2) challenges to the Board's interpretation of what constitutes "immoral conduct" within the meaning of § 168.114.1(2) (findings 10–12 and 14–17). Teacher urges the findings in the first category are beyond the scope of the charges served upon him and are unsupported by competent and substantial evidence. As for the latter category, Teacher maintains that the Board has effectively substituted an unconstitutionally vague standard of "community standards" for an equally vague standard of "immoral conduct," improperly relied on a minor's perceptions to determine the appropriate standard of conduct, and arbitrarily and capriciously found him guilty of "immoral conduct" in contravention of criteria established in prior cases.

A. Conduct Involving Other Students

As our summary of the evidence suggests, there was not a scintilla of testimony from any witness which would support the Board's findings 7, 8 and 9 that other students had reported being offended by Teacher's physical actions, that students had expressed reluctance to report such fears, and that the administration had previously advised Teacher of the fear and offensiveness students felt as a result of his physical actions. Based on careful scrutiny of the record and the Board's brief, it appears that the genesis of these findings lies in the Board's misplaced reliance on hearsay testimony and a single, five year old hearsay report buried deep within Teacher's "building level" file which was admitted over Teacher's objections. For a number of reasons, we find that findings 7, 8 and 9 are not supported by competent and substantial evidence and cannot serve as the basis for discipline on the charges served upon Teacher.

The only conceivable basis we can find in the record for the Board's finding that "some students" have expressed reluctance to report their fear or offensiveness of Teacher's "physical actions" (finding 8) is the testimony of Denis Fleer, a witness called by Board's attorney in rebuttal. Mr. Fleer was asked by the Board's attorney whether any of his children had "expressed a fear to come forward with what they had seen in his [Teacher's] class." Mr. Fleer said they had. Board's attorney then asked Mr. Fleer what his daughter had relayed to him and Teacher's counsel objected on the grounds that the question called for hearsay, which was not competent evidence. After it became apparent that any testimony Mr. Fleer would give would be based on hearsay reports from his children, Board's attorney discontinued questioning and the witness was excused.

Hearsay evidence is not competent and substantial evidence unless admitted without objection. In this case, the only hearsay testimony by Mr. Fleer admitted without objection was his testimony that one or more of his children had expressed a reluctance to come forward with "what they had seen in his [Teacher's] class." Thereafter, Teacher objected to questions seeking to elicit hearsay and the questions were never answered. Nothing in this single question and answer elicited without objection suggests that the children's fear and reluctance to come forward pertained to Teacher's hugging and kissing C.C., themselves or any other student, or indeed any "physical actions" of Teacher. Thus, there is no competent and substantial evidence to support finding 8. We therefore deem such finding to be stricken from the record.

The only source to which we have been cited for Board's findings 7 and 9 is Exhibit No. 7, Teacher's "building level" file, which was received over Teacher's objection and remains under seal. The exhibit consists of some 78 unnumbered pages. When offered, Teacher objected to admission of any portion of the file other than his written evaluations, which Teacher requested not to be admitted under seal. Teacher objected that the balance of the file was not relevant or material to the charges. The Board apparently had not had a chance to examine the file so the document was received with the understanding that counsel would be advised "a little later" whether the Board considered the exhibit relevant and material. So far as the record reflects, the first time Teacher or his attorney was advised that the exhibit would be considered in the Board's deliberations was when the Board issued its findings.

Although it is not dispositive of the issue presented, we note that the objections of Teacher's counsel were well taken and should have been ruled upon prior to the close of the hearing so that Teacher would be on notice of the evidence offered against him. For the most part, the material in the file had nothing whatsoever to do with the charge and should have been excluded. Where evidence is challenged on the ground of relevance and materiality and plainly contains matter that is not relevant or material, the proper procedure would be to require the proponent of the exhibit to identify the portions of the document that are relevant and material and explain why.

The inherent unfairness of failing to follow such a procedure is well illustrated by this case. Having scrutinized the entire 78 pages of Exhibit 7 for any material which conceivably could have given rise to findings 7 and 9, we find a single handwritten, unsigned, two-page report apparently prepared by a former principal approximately 4½ years prior to the hearing. In this report, the writer states that a student, T.H., came into the office and said she was afraid of Teacher. She said he was impatient with her. According to the report, T.H. also said she had seen Teacher rub a male student, D.L., on the back and "caress" his cheek (apparently during class). T.H. is also reported to have said that two other girls had told her they had seen Teacher whisper in D.L.'s ear. T.H. also said that others had seen "similar things" in a class with J.G., another male student. The report then states that the writer told Teacher what T.H. had said. The report concludes, "He stated he touched students as any other. I said I wasn't here to stop him but wanted him aware. Matter dropped." . . .

[E]ven in the absence of a hearsay objection, we fail to see how the single, 4½ year old report described above is relevant to any issue presented for hearing. The report makes no mention of Teacher hugging or kissing any student. Rather, it appears to be a complaint by a female student that Teacher showed favoritism by directing more physical attention to male students in the classroom. There is no indication that the female student feared Teacher would engage in any offensive contact toward her or that the recipients of Teacher's physical contact in the classroom found it offensive. Nor does it appear that the author of the document so perceived the report, inasmuch as the author stated she "wasn't here to stop him" and that the matter was dropped. If anything, the document tends to support Teacher's position that school authorities knew about and sanctioned his physical demonstrativeness toward students. Accordingly, we find that Board's findings 7 and 9 are not supported by competent and substantial evidence.

B. Immoral Conduct

In its brief, Board characterizes the findings set forth in full above as a determination that Teacher made sexual advances toward C.C., thus constituting sexual harassment and "immoral conduct" within the meaning of § 168.114.1(2). Had the Board in fact charged and found Teacher to have made sexual advances toward C.C., we would readily agree that making sexual advances toward a 14 year old child constitutes immoral conduct. But this is not, in our view, either what the Board charged or found.

Mr. Doerhoff, who drafted the charge, never stated that he thought Teacher hugged or kissed C.C. for the purpose of sexual gratification or out of any other depraved motive. In his notes of his discussion of the incident with Teacher on the afternoon of March 18, he specifically noted that no one suggested that there was any sexual motive on Teacher's part. Rather, Mr. Doerhoff's position was that Teacher's actions toward C.C. could be misinterpreted. Mr. Doerhoff obtained no new information between his discussions with Teacher and his delivery of the charge. The charge delivered to Teacher does not mention sex or sexual motive. Thus, it is difficult to understand how the Board can now maintain that the charge should be interpreted to accuse Teacher of making sexual advances toward C.C. or, more importantly, that the charge was sufficient to so apprise Teacher.

Nor can we agree that the findings of the Board represent in any way a determination that Teacher made sexual advances toward C.C. The Board's findings begin with the undisputed facts that Teacher hugged C.C., rubbed his back and kissed him on the neck. Thereafter, the Board's focus (disregarding findings 7–9 for the reasons discussed above) is exclusively on C.C.'s *reaction* to Teacher's conduct—*i.e.*, C.C. *interpreted* the conduct as a sexual advance; C.C. was *offended*; C.C. was *afraid*; C.C. reasonably *perceived* the conduct as "sexual harassment"; Teacher's conduct was *not solicited* or *welcomed* by C.C. (findings 4, 11, 13). Then, based solely on these findings as to C.C.'s (and improperly, other students') reactions to Teacher's conduct, the Board finds that Teacher's actions were "inappropriate," "do not conform to the standards of this community" and "*therefore* amount to immoral conduct" (findings 10, 12, 14; emphasis added). Finally, again relying solely on the wholly unproven fears of students generally, the Board concludes that Teacher is unsuitable to teach and educate students in the district (findings 15, 16).

The Board made no findings whatsoever as to Teacher's intent or motive for the conduct charged. Rather, the findings are fully consistent with Mr. Doerhoff's position that Teacher's conduct was "inappropriate" because it "could be misinterpreted." Based on our review of the Board's findings and the evidentiary record, we conclude that the Board's omission of any finding that Teacher engaged in the subject conduct for the purpose of sexual gratification or other improper motive was intentional. Had the Board concluded that Teacher was motivated by any sexual intent, there would have been no reason to make any findings as to whether the conduct was offensive to or solicited by C.C. If the Board believed that Teacher hugged and kissed C.C. for the purpose of sexual gratification, it would be irrelevant whether C.C. invited or enjoyed it. Sexual advances toward a child constitute immoral conduct by a Teacher regardless of the child's reaction or invitation. Thus, the fact that the Board focused exclusively on the offensiveness of the conduct to C.C. strongly corroborates our conclusion that the Board accepted Teacher's explanation that his actions were motivated by a sense of caring and concern for C.C. and were an attempt to comfort him.

In this regard, it should also be noted that C.C. himself perceived this to be Teacher's motive at the time of the first incident. Although he perceived the second incident differently, the second incident occurred after C.C. had reported the first incident to another teacher, stating if Teacher ever tried it again, he would do something about it. This warning was never passed on to Teacher. Although C.C. did not know if the warning had been communicated to Teacher, the fact that he had voiced his objection to someone in authority could well justify his viewing the second incident in a different light. Thus, the Board's finding that C.C. reasonably perceived Teacher's actions as "sexual harassment" does not equate to a finding that this was, in fact, Teacher's intent. Rather, based on the findings and conclusions adopted by the Board, it is clear that Board's position is that Teacher's conduct was "immoral" even if his intent was precisely what he said it was—*i.e.*, an expression of caring and concern for the child.

Teacher urges that such reasoning improperly and unconstitutionally employs an admittedly emotionally troubled student's *reactions* as the decisive test of "community standards," which Teacher maintains is itself a concept even more vague than "immoral conduct.". . .

[W]ords employed by the legislature are generally to be given their plain and ordinary meaning. . . . The purpose of the Teacher Tenure Act is to provide substantive and procedural safeguards with respect to tenured teachers. Statutory grounds for dismissal are to be strictly interpreted to fulfill the legislature's intent that permanent teachers have a measure of certainty and stability in employment without being subjected to arbitrary school board action.

According to Webster's New Universal Unabridged Dictionary (2d ed. 1983), the term "immoral" means "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformance with accepted standards of proper sexual behavior; unchaste; lewd; licentious; obscene." Each of these definitive terms shares a common element of wrongful intent or conscious disregard of established mores such that the act itself bespeaks or permits a presumption of knowledge of its wrongful character.

This understanding of the term immoral conduct is also compelled by the principle that a statute is to be construed as constitutional, if at all possible. . . . [T]he Teacher Tenure Act confers upon permanent teachers a protected property interest which cannot be deprived without adequate notice. Further, because the grounds for removal are penal in nature, they must be interpreted so as to fully apprise those who are subject to its restrictions as to the prescribed conduct with a reasonable degree of certainty. The law must give persons of ordinary intelligence an opportunity to know what conduct is prohibited so that they will have an opportunity to avoid that type of conduct.

The term "immoral conduct" is sufficient to provide the constitutionally required fair warning if, and only if, it is strictly construed to encompass only conduct which permits the inference of a *conscious disregard* of established moral standards. So construed, the consciousness of wrongdoing serves as notice.

Addressing the concept in a somewhat different context, our supreme court has held that "moral turpitude" means acts which are "contrary to justice, honesty, modesty or good morals, or involving baseness, vileness or depravity" by one who "comprehends the nature and consequences of his conduct." In view of the recognized purposes of the Teacher Tenure Act . . . we believe the term "immoral conduct" must be accorded the same meaning. At a minimum, the term "immoral conduct" as used in § 168.114.1(2) contemplates conduct which is sufficiently contrary to justice, honesty, modesty or good morals, or involving baseness, vileness or depravity so as to support the inference that the teacher consciously comprehended the wrongful nature of the conduct. . . .

[I]mmoral conduct is conduct which goes beyond a matter of judgment such that the teacher may properly be presumed to have prior notice of its wrongful character and thus may be properly held responsible for his conscious disregard of established moral standards. Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent. To hold otherwise would vitiate the legislature's intent to provide stability and certainty in matters of teacher discipline and seriously undermine if not destroy the concept of prior notice that due process requires in teacher termination cases.

It follows that the Board's determination that Teacher engaged in "immoral conduct" cannot properly be predicated solely on C.C.'s reactions to Teacher's conduct. Experience suggests that individual reactions to the most well-intended displays of affection or comfort vary widely from person to person. It is undisputed that Teacher had no prior notice that C.C. found his physical demonstrativeness offensive or that C.C. interpreted Teacher's actions in the manner that he did. If Teacher's actions were undertaken for the purposes of sexual gratification, he would be guilty of immoral conduct regardless of whether C.C. found it offensive or even solicited it. Conversely, a gesture perfectly innocent or even laudable in intent may nonetheless be misperceived by the recipient. Failure to appreciate the potential for such misperception may well be bad judgment, but it is not, without more, immoral conduct within the meaning of § 168.114.1(2).

As discussed above, the Board made no finding that Teacher had an improper motive. Nor, in the existence of our authority to weigh the evidence, do we find that the evidence presented at the hearing supports a finding that Teacher's actions were motivated by anything other than caring and concern for C.C.'s apparent distress. C.C.'s testimony confirms that there was a valid basis for Teacher's concern. Although C.C. denied that he was crying, he stated that the incident began when Teacher asked him what was wrong, thus indirectly confirming that his distress was manifest. In response to Teacher's inquiry, C.C. confirmed that he was not feeling well, which would naturally cause any Teacher to express feelings of caring and concern. What followed was a clash of two opposite cultures. C.C. comes from a background in which "nobody that's even close to me like relatives or anything would kiss me on the neck." Teacher comes from a background in which such gestures are routine. In hindsight, Teacher may certainly be faulted for his failure to appreciate that these sort of cultural differences exist and that his physical demonstrativeness might be offensive to those with different backgrounds or even misperceived as a sexual advance. On this record, it appears that Teacher's actions were misconstrued by C.C.; they clearly were offensive to him. Yet these subjective reactions, even if they are the product of poor judgment on Teacher's part, cannot transform well-intended conduct into an immoral act.

We find also no evidentiary support for the Board's determination that Teacher's actions did not "conform to the standards of the community." All of the evidence was to the contrary. Neither the principal nor the superintendent were willing to testify that hugging or even kissing a child of middle school age would be immoral in all circumstances. Several teachers testified that physical contact with students had been expressly encouraged. The superintendent testified that he had never issued any policy on the matter aside from his specific instructions to Teacher upon the afternoon of March 18, two days after the incident occurred.

Our determination that the record does not support a determination that Teacher engaged in "immoral conduct" does not mean that the Board or school officials cannot take steps to ensure that such misunderstandings do not occur in the future. The statute provides a procedure for appropriate corrective action whereby individual teachers can be notified of the need to modify undesirable behavior and disciplined for failure to do so. Further, in view of the manifest confusion among middle school teachers testifying at the hearing, a clear policy on physical contact between teachers and middle school students would no doubt be well advised. As Mr. Combs testified, children of middle school age are entering into a period of great physical, emotional and sexual change. At a time when children are being regularly admonished to be suspicious of physical contact initiated by adults, the danger that an innocent gesture will be misinterpreted is high. But the teacher termination process is not the appropriate vehicle for establishing school policy. Under the Teacher Tenure Act, teacher termination is justified as a means of enforcing *existing* policy or established moral standards that, by their nature, do not require codification.

For the reasons set forth above, we hold that the evidence in this case does not support a finding that Teacher engaged in "immoral conduct." Although Teacher may have exhibited poor judgment in failing to anticipate that his actions might be offensive to or misinterpreted by C.C., such a lapse in judgment does not constitute "immoral conduct." Teacher testified to his willingness to conform his behavior to whatever policy school officials may adopt. Should he fail to do so, he will clearly be subject to further disciplinary action.

The judgment of the circuit court is reversed and the cause is remanded for entry of an order for Mr. Youngman's reinstatement and for further proceedings consistent with this opinion and § 168.118.4.

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BOARD OF EDUCATION OF LONG BEACH UNIFIED SCHOOL DISTRICT v. JACK M.

Supreme Court of California, 1977
566 P.2d 602

Tobriner, Justice.

On October 19, 1972, defendant was arrested for an alleged homosexual solicitation in a public restroom. Although no charges were ever filed against him, plaintiff school board initiated proceedings in the superior court to establish its right to discharge defendant from his tenured teaching position. The superior court, however, resolved conflicting evidence in defendant's favor and found that his conduct did not demonstrate unfitness to teach. The board appeals from the judgment in favor of defendant.

In accord with the unquestioned principle that trial court findings supported by substantial evidence will be upheld on appeal, we affirm the judgment below. The board's attempt to escape the application of this principle of appellate review by claiming that defendant's conduct in itself proves unfitness to teach must fail, since neither statute nor decisional authority has applied a rule of per se unfitness to persons who were not convicted of specified sex offenses. The board's argument, moreover, conflicts with legislation enacted in 1976 that grants even to a person convicted of a specified sex offense the right to a fitness hearing; consistent with the purpose of that legislation we cannot hold the commission of such acts demonstrates unfitness per se.

I. PROCEEDINGS IN THE TRIAL COURT

Defendant has been continuously employed for 16 years as a permanently certified teacher for elementary schools. Until the incident of October 19, 1972, he was recognized as a teacher of fitness, ability and unimpeached moral character. On that date he was arrested for violating Penal Code section 647, subdivision (a), which penalizes as a misdemeanor the solicitation of anyone to engage in or engagement in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view. Although no charges were filed, defendant immediately reported his arrest to Mrs. Joan White, principal of the elementary school in which he taught the fifth grade. The board filed a complaint in the superior court, pursuant to Education Code section 13412 as it then read, charging him with "immoral conduct" and "evident unfitness for service."

The only two witnesses to the incident were defendant and the arresting officer. The officer testified to the following sequence of events. Entering a department store restroom equipped with five doorless stalls, he occupied the stall furthest from the door. Defendant entered the adjoining stall, bent down and looked up at the officer from under the partition separating the stalls. The officer dressed and, looking into defendant's stall, observed defendant masturbating. Defendant then beckoned to the officer, saying "come here. You will like this." The officer thereupon arrested defendant for lewd conduct in a public place. Defendant testified that he had not masturbated or solicited the officer, but the trial court upheld the officer's version.

The remaining testimony concerned defendant's fitness to teach. The board presented the testimony of Mrs. White, defendant's principal, and Mr. Lepic, an experienced school principal who did not know defendant but testified as an expert on teaching qualifications. Defendant countered with testimony from Dr. Davis, a psychiatrist who was experienced in examining persons convicted of sexual offenses.

Mrs. White testified that defendant was fit and competent in all respects as a teacher; that she knew that he was under heavy emotional stress at the time in question but that nevertheless she felt that the charged conduct demonstrated "unusual judgment and improper reaction to stress and pressure." She stated that she had no reason to believe that he could not now perform his specific duties as a certified teacher but that she was not willing to take the chance that the incident might recur and that, therefore, she felt that defendant was unfit to teach.

Mr. Lepic testified as to the essential qualifications of an elementary school teacher—adequate professional training and development of a close relationship with students, parents and staff. In response to a hypothetical question premised upon the account given by the arresting officer, he gave his opinion that defendant was unfit to teach. As reasons for his opinion he testified that defendant could not provide a behavioral example to students and that his conduct would create uneasiness and an erosion of confidence in those with whom he was in association, such as students, parents and staff. He was unaware of any knowledge by those groups of such conduct or any attendant publicity, but was disturbed by the possibility of recurrence, depending upon the tensions and pressures to which defendant might be subjected in the future.

Dr. Davis' background indicated that he was well experienced as a psychiatrist in the examination and treatment of sexual deviates. He concluded from the history of defendant and his clinical examination of defendant that defendant was not a homosexual; that if the arresting officer's version were true, this account would indicate to the doctor an isolated act of aggressive behavior by one of an otherwise passive sexual disposition precipitated by an unusual accumulation of pressure and stress stemming from his mother's serious illness; that it would be most unusual for an individual with a predisposition to aggressive homosexual behavior to reach middle age without some prior antisocial conduct reflected in a police record, and here there was none; and that even if the incident happened, he believed there was no danger of recurrence because of the trauma to defendant from this arrest and the trial proceedings.

He believed that there was no danger to pupils or associates, and no possibility of recurrence, and because of a medically recognized proclivity of sexual deviates to follow a specific pattern, the conduct attributed to defendant would not be consistent with acts endangering children or associates.

The trial court resolved the conflicting testimony on the issue of fitness in favor of defendant. Finding that defendant's conduct did not demonstrate an unfitness to teach, the court entered judgment ordering his reinstatement with back pay.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT DEFENDANT'S CONDUCT DOES NOT DEMONSTRATE HIS UNFITNESS TO TEACH

Defendant's fitness to teach was the factual issue which faced the trial court. Although defendant was charged with "immoral or unprofessional conduct" (Ed. Code, § 13403, subd. (a)) and "evident unfitness for service" (Ed. Code, § 13403, subd. (e)), we have previously held that the determinative test was fitness to teach; the terms "immoral" or "unprofessional conduct" are so broad and vague that, standing alone, they could be constitutionally infirm; hence the proper criteria [sic] is fitness to teach. *Morrison v. State Board of Education*, 461 P.2d 375 (1969). Observing that a statute can constitutionally bar a person from practicing a lawful profession only for reasons related to his fitness to practice that profession we concluded in *Morrison* that the board cannot "abstractly characterize the conduct in this case as 'immoral,' 'unprofessional,' or 'involving moral turpitude' within the meaning of section 13202 . . . unless that conduct indicates that petitioner is unfit to teach."

Pursuant to these rulings the trial court found that defendant's conduct did *not* demonstrate an unfitness to teach. Our sole task is to determine "whether the evidence, viewed in the light most favorable to [defendant], sustains these findings." Moreover, "in examining the sufficiency of the evidence to support a questioned finding an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion." If appellate scrutiny reveals that substantial evidence supports the trial court's findings and conclusions, the judgment must be affirmed.

Relying upon the foregoing authorities, the trial court accordingly framed the following findings in terms of fitness to teach, and those facts which bear on the subject of fitness: "¶ 6. Defendant's conduct did not come to the attention of the public, students, parents, fellow teachers, and other staff members other than to defendant's immediate superior to whom he reported the incident. ¶ 7. Defendant's conduct was an isolated act precipitated by an unusual accumulation of pressure and stress. There is no danger that defendant will repeat the conduct. ¶ 8. Defendant does not present a threat to students or fellow teachers. ¶ 9. Defendant's conduct does not demonstrate an unfitness to teach."

Review of the record reveals ample evidence to support those findings. Finding number 6 rests on the undisputed testimony of defendant and Mrs. White, his principal; finding number 7 on the explicit testimony of Dr. Davis. Finding number 8 responds to our holding in *Morrison v. State Board of Education*, that "an individual can be removed from the teaching profession only upon a showing that his retention . . . poses a significant danger of harm. . . ." This finding rests upon defendant's testimony respecting his teaching record and his response to his arrest, Mrs. White's testimony confirming defendant's competent performance as a teacher and his ability to perform his teaching duties; and Dr. Davis' testimony that the restroom incident was an isolated and aberrant act not indicative of defendant's ordinary character and ability, that defendant would learn from his experience, and that he would not repeat the conduct. Finally, the evidence we have recited in support of findings 6, 7, and 8, viewed in the light of defendant's proven 16-year record of competent teaching, fully supports the trial court's *ultimate* finding that the defendant's conduct did not demonstrate an unfitness to teach.

In challenging the trial court's findings, the board argues that students, viewing their teacher "in the light of an exemplar" may emulate defendant's act; that defendant may be unable to fulfill his duty "to impress . . . and to instruct [his students] in manners and morals" (Ed. Code, § 13556.5); and that defendant's conduct evidenced a lack of judgment and discretion. But these arguments are really no more than disputable inferences which the trial court rejected in favor of other inferences more favorable to defendant. The courts uniformly hold that "where two or more inferences reasonably can be drawn from the facts, an appellate court is without power to substitute its deductions for those of the trial court."

Moreover, the evidentiary record provides reasonable grounds to justify the trial court in rejecting the inferences drawn by the board. Proof that defendant's act was unknown to his students, testimony that he would not repeat such conduct, the absence of evidence that he had by word or example influenced students to engage in improper activity all combine to indicate the insubstantiality of any risk that students would imitate his conduct.

The board presented no evidence to show that defendant, in 16 years of teaching, had failed to impress and instruct his students in manners and morals; defendant's principal testified that defendant was capable of performing his statutory duties. And although defendant's actions on October 19, 1972, may suggest a lack of judgment and discretion, the trial court found that this particular conduct "was an isolated act precipitated by an unusual accumulation of pressure and stress." The absence of any other incident in defendant's teaching career suggestive of lack of judgment or discretion further distinguishes the aberrant character of the restroom incident. Based on the evidentiary record, the trial court could reasonably conclude that the isolated incident of poor judgment was overweighed by years of demonstrated teaching competence, and that on balance defendant possesses the qualities of character necessary for teaching fitness.

We reiterate: the task of this court is to determine only whether the findings and conclusions of the trial court, as a matter of law, lack support in the record. Since testimonial evidence, including probative expert testimony and reasonable inferences drawn from that evidence, support the findings of the trial court, we must affirm the judgment below.

III. THE FACT THAT DEFENDANT MAY HAVE COMMITTED PUBLIC SEXUAL OFFENSE DOES NOT AUTHORIZE AN APPELLATE COURT TO DISREGARD CONTRARY TRIAL COURT FINDINGS AND DECLARE HIM UNFIT TO TEACH PER SE

Confronting the adverse findings of fact by the trial court, the board shifts its ground and contends that proof that defendant committed a public sexual offense demonstrates unfitness to teach per se. As we shall explain, the pre-1976 statutes in effect at the time of trial of this case carefully distinguished between persons convicted of listed sex offenses, who were subject to automatic sanctions, and those not convicted, who were entitled to a fitness hearing. The board's assertion that a teacher not convicted of a listed offense is unfit per se undermines that statutory distinction; by deeming irrelevant all evidence bearing on fitness except evidence that he did or did not commit the charged act, the contention would effectively nullify the teacher's statutory right to a fitness hearing. And as we shall further explain, the 1976 statutes, which govern the appeal of this case, grant even some persons *convicted* of listed sex crimes a fitness hearing; the board's claim that commission of such a crime demonstrates unfitness per se cannot be reconciled with that legislation.

The board bases its argument on the theory that defendant's conduct could be described as constituting a violation of penal statutes conviction for which would require a teacher's dismissal under pre-1976 law. The controlling statutes, however, impose automatic sanctions only upon persons *convicted* of a listed crime. No statute imposed automatic sanctions upon persons *not convicted* of listed crimes.

Cases interpreting the pre-1976 statutes conform to this distinction between persons convicted of listed crimes and those not convicted. Those three decisions that have denied teachers a fitness hearing involved teachers who were convicted of a listed crime. Distinguishing the case of one convicted of a listed crime, our decision in *Morrison v. State Board of Education*, established the right of a person not so convicted to a fitness hearing. Our listing in *Morrison* of the factors to be considered in evaluating fitness made it clear that the hearing could not be limited to the single question whether the teacher committed the charged act . . .

CONCLUSION

Substantial evidence supports the trial court's finding that defendant's conduct did not demonstrate his unfitness to teach. Evidence admitted without objection demonstrated defendant's teaching competence, and rendered insubstantial any fear that he might repeat the charged act or otherwise harm students or fellow teachers. Since substantial evidence supports the trial court findings of fact and conclusions of law, we affirm its judgment directing reinstatement of defendant to his teaching position with back pay.

* * *

The following opinion, also discussed in Chapter 9, presents the framework for deciding cases in which a teacher claims to have been dismissed in violation of a constitutional right but the school claims that the dismissal was for incompetence. The case also reviews the approaches of various courts to balancing teachers' claims of academic freedom against the right of schools to control their own programs and deals with the question of whether a single instance of poor judgment in the classroom can be grounds for dismissal.

KRIZEK v. CICERO-STICKNEY TOWNSHIP HIGH SCHOOL DISTRICT NO. 201

United States District Court, Northern District of Illinois, 1989
713 F. Supp. 1131

Norgle, District Judge.

Before the court is plaintiff's motion for a preliminary injunction. Plaintiff moves to enjoin her former employer's decision not to renew her employment contract. For the following reasons, the motion is denied.

FACTS

The following facts are undisputed. Plaintiff, Georgine Krizek, was a non-tenured English teacher at Morton High School's West Campus in Berwyn, Illinois. She had previously been a tenured teacher at another school, but after changing jobs was hired as a non-tenured teacher under a one year employment contract which neither employer nor employee was obligated to renew. The contract was completed and not renewed.

During the Fall Semester, in 1987, Mrs. Krizek showed her class of third year high school students the film "About Last Night" ("The film"). The film is two hours long. The purpose of showing the film was to present it as a modern day parallel to Thornton Wilder's play "Our Town." The students were told that if they or their parents might be offended by the film, the students would be excused from viewing the film. Mrs. Krizek did not communicate directly with the parents, and the record is silent as to how many students even mentioned the film to their parents.

The court viewed the film *in camera*. The film was given an "R" rating (persons under 17 years of age not admitted without parent or guardian) by the Motion Pictures Association. The film is about a handsome young man who meets an attractive young woman at a single's bar. The two go home to his apartment and sleep together. The next morning, the young woman begins to leave, apparently believing that the encounter was a one night stand. However, the young man asks to see her again, and the two develop an ongoing relationship. The relationship lacks depth, in that the two do not share their feelings with each other or communicate well; the relationship is based on mutual physical attraction. Eventually, the woman moves in with the man, although they are unmarried. As the woman urges marriage, the man finds himself unwilling to accept commitment, and ends the relationship. Later, he decides that he wants to begin seeing her again. In the end, the two discuss the mistakes they made and the viewer is left with the implication that the relationship will resume in some form. The film also contains subplots involving the two main characters' best friends; a rowdy young man and a cynical young woman.

The film contains a great deal of vulgarity and sexually explicit scenes. There are numerous scenes depicting the couple engaging in sexual intercourse, in which bare breasts and buttocks are seen. One particularly explicit scene shows the couple having intercourse in a bathtub filled with sudsy water. The vulgarity consists of numerous uses of "swear words," and frequent explicit sexual references. . . .

On Thursday, April 14, 1988, more than four months after Mrs. Krizek showed the film to her class, a parent of one of the students in the class telephoned W.D. Ritis, Dean of Instruction at Morton West High School ("the Dean") to complain about the showing of the film, and about the showing of two other films. . . .

It is undisputed that the Principal gave three reasons for recommending that plaintiff not be rehired: her use of R-rated materials unrelated to the curriculum, her incomplete response to the investigation of the parent's complaint, and her harassment of the student whose mother complained. It is also undisputed that the Principal made his decision to recommend that no new contract be made with Mrs. Krizek before her conversation with the student whose parent had complained. Apparently, Mrs. Krizek remained until the end of the school year, but was not rehired for the following school year.

Finally, there is an issue as to whether teachers were required to obtain prior approval before showing films, although the evidence seems to indicate the absence of any such rule. Moreover, it is undisputed that there existed no particular proscription against showing movies rated R or worse.

DISCUSSION

. . . Plaintiff's case centers around her allegation that the decision not to make a new contract with her violated her rights under the First Amendment. The First Amendment protects a probationary teacher as well as a tenured teacher. Thus, even though defendants could have decided not to renew Mrs. Krizek's contract at will, they could not refuse to renew her contract in retaliation for her exercise of her First Amendment rights. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Moreover, if defendants acted based on both permissible and impermissible motives, Mrs. Krizek would be entitled to judgment if the impermissible motive was a substantial factor in the decision, and defendants are unable to demonstrate that they would not have entered into another contract with plaintiff even if the incident in question had not taken place. Therefore, to prevail in this action, plaintiff would have to demonstrate two things: that her showing the film was a substantial factor in the decision not to renew her employment contract, and that the failure to renew her contract for showing the film was a violation of her First Amendment rights.

The first issue is easily resolved in plaintiff's favor. Plaintiff's showing of the film is stated as one of three factors in the decision not to renew the contract. Moreover, one of these factors, the alleged harassment of a student, occurred after plaintiff was told she would not be rehired. Therefore, plaintiff has a substantial likelihood of demonstrating that her showing the film was a substantial factor in the decision not to rehire her. Furthermore, it is unlikely that defendants will be able to demonstrate that they would not have rehired plaintiff but for her showing of the film, as the other two stated reasons for not rehiring plaintiff would not have occurred had plaintiff not showed the film.

The second issue is much more complex, and merits extended discussion. It is beyond dispute that, to some extent, the First Amendment protects teachers' expression in the classroom.

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. [Citation omitted.]

This protection is not, for the most part, for the benefit of a teacher. As a general rule, employers are free to restrict the expression of employees in the conduct of their work. For example, a newspaper editor may order a reporter not to write the article that the reporter wants to write. The editor may tell the reporter "if you want to express a different view, do it on your own time."

Rather, the protection is primarily for the benefit of the student, and as a result, society in general. In a sense, it protects the student's "right to hear." Public schools perform a vital function in our society. That function has two key aspects. First, a public school system strives to develop inquisitive minds and independent thought. Second, a public school system provides intellectual and moral guidance, and transmits the mores of the community. The second function justifies the imposition of limitations on teachers' classroom expression. However, the first function cannot be achieved unless the individual teachers are given some measure of academic freedom. Therefore, the limitations placed on teachers' expression must themselves be limited. Application of the First Amendment to classroom settings requires the courts to balance these two functions and set the parameters for how far schools may go in restricting teachers' expression in the classroom.

There are two types of cases involving teachers' expression in the classroom. First, there are cases involving curriculum content rules promulgated by the school administration and challenged by teachers. Second, there are cases where a teacher is disciplined for expression in the classroom, despite the fact that the expression in question violated no specific rule. The case before the court is of the latter variety. Nevertheless, a brief discussion of the former is essential for purposes of comparison and an analytical framework.

The courts have stated that, as a general rule, a school administration may establish the curricular contents of a course. In particular, in a public school system, where the state pays the costs of the education, it is legitimate for the curriculum of the school district to reflect the value system and collective will of those whose children are being educated. Consequently, the cases involving challenges to school imposed restrictions on the content of courses can be characterized as being deferential to the judgment of the school administrators, generally upholding such restrictions. . . .

[T]he Seventh Circuit stated that "complaints filed by secondary school students to contest the educational decisions of local authorities are sometimes cognizable but generally must cross a relatively high threshold before entering upon the field of a constitutional claim . . . [N]othing in the Constitution permits the courts to interfere with local discretion until local authorities begin to substitute rigid and exclusive indoctrination for the right to make pedagogic choices regarding matters of legitimate dispute." The court went on to deny the plaintiffs' claim because they failed to demonstrate a "flagrant abuse of discretion." Thus, the Seventh Circuit has articulated and explained a "flagrant abuse of discretion" standard of review.

More recently, the Supreme Court stated "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expression so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Kuhlmeier* can be factually distinguished from the present case, so it does not necessarily follow that the standard stated therein applies to a school administration's restrictions on the content of classroom materials. However, one court has already applied the standard articulated in *Kuhlmeier* to review of a school's removal from the curriculum of a textbook it deemed sexually explicit and vulgar. See, *Virgil v. School Board*, 677 F. Supp. 1547, 1551 (M.D. Fla. 1988) *aff'd*, 862 F.2d 1517 (11th Cir. 1989). The court agrees with that application, and finds that the *Kuhlmeier* standard, which blends well with the standard previously articulated in this circuit, applies to challenges against school administration rules regarding curriculum contents.

Applying this standard, the court has no doubt that the school administration, had it chosen to so do, could have forbidden the showing of the film "About Last Night." Reasonable people could disagree about whether the film is appropriate classroom viewing for 16–17 year old students. . . .

If the school had banned the film, the teacher would have had no First Amendment right to show the film because the school's decision was within its right to control the curriculum. If she had showed the film anyway, the school could have legitimately fired her; the reason for the non-renewal would not have been for exercising First Amendment rights, but rather for disobeying a legitimate school rule. However, this is not a case about a teacher's refusal to obey a school administration's order not to show a particular film. The question here is related, but different: whether the school's decision not to enter into a new contract of employment with Mrs. Krizek due to her showing of the film, even though there was no rule against that showing, violated her First Amendment rights. It is to that question which we now turn.

Research unearths no generally accepted standard for when it is appropriate for a school to fire a teacher for classroom conduct not prohibited by any advance restriction, but deemed inappropriate by the school after the fact. It is useful to review the cases which have faced this issue and consider the utility of the standards of review stated in those cases.

In the majority of the cases in which no advance restriction was violated, the courts have found violations of First Amendment rights. In *Kingsville Independent School District v. Cooper*, 611 F.2d 1109 (5th Cir. 1980), a non-tenured high school teacher used a role-playing simulation to teach the history of the post-American Civil War Reconstruction period. The school decided not to renew her contract because the school received numerous complaints about the controversial nature of the simulation. The court held that the simulation was protected speech, and the discharge "cannot be upheld unless the discussions clearly overbalance her usefulness as an instructor." This court does not dispute the outcome of *Cooper*, but finds the standard stated therein too restrictive of the school's discretion. That standard seems to accord deference to the teacher's judgment as to the propriety of classroom material rather than to the school's. Yet, as is explained above, the courts have acknowledged that school administrations have primary responsibility for determining what is appropriate for the classroom.

In *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971) *aff'd*, 448 F.2d 1242 (1st Cir. 1971) (affirming the outcome without stating an agreed upon rule), a high school teacher wrote the word "fuck" on the blackboard, asked a student what the word meant, and explained that the definition, "sexual intercourse," is not a taboo word in our culture, but the word on the blackboard is. The teacher did this to illustrate that to some extent a society and its ways are illustrated by its taboo words. This discussion was to help explain the meaning of a book legitimately assigned to the students. The district court found that the case involved the use of teaching methods which divide professional opinion." The court found that in such a case "the state may suspend or discharge the teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by a regulation or otherwise that he should not use that method." The district court found that no such warning had been given, and therefore ordered the defendants to re-employ the plaintiff. Thus, the district court's standard seems to be that a school may never fire a teacher "after the fact" for poor judgment in choice of teaching materials. . . .

The court rejects this standard as too restrictive of administrators for two reasons. First, it would be impossible for a school to proscribe every imaginable inappropriate material. Second, schools should not be encouraged to attempt to do so. Any chilling effect of the threat of termination could be outweighed by the constriction resulting from a maze of regulations on what may and may not be done in the classroom. Therefore, some after the fact judgment by the school must be allowed. For example, if a teacher showed an X-rated movie to elementary school students, surely the teacher could be fired, even absent a regulation against such a showing.

Hence, this case does not end our search for the appropriate standard. However, the court agrees with the *Mailloux* court's reference to the seriousness of the sanction as a relevant consideration in reviewing a school's disciplining a teacher for exercising poor judgment in selection of classroom materials.

In *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), a tenured high school teacher assigned an article from *Atlantic Monthly* which contained the word "motherfucker." He explained the word and why the author had included it, and allowed any student who found the word offensive to choose an alternative assignment. The court granted a preliminary injunction against dismissal, finding a substantial likelihood that the plaintiff would prevail on the merits, based both on the appropriateness of the material and on the lack of notice that discussion of the article with a class of high school seniors was forbidden conduct. By stating that it was probable that the plaintiff would prevail in showing that he had no notice his conduct was forbidden, without explaining what would be the case if the plaintiff made such a showing, the court implied that such a showing alone would be enough for the plaintiff to prevail on the merits. As explained above, this court does not accept such a rule.

Several courts have used standards which give little deference to the decisions of school administrations, and require a showing that the complained of actions of the teacher had a "disruptive effect." In *Dean v. Timpson Independent School District*, 486 F.Supp. 302 (E.D. Tex. 1979), a high school teacher was fired for assigning an article in *Psychology Today* entitled "Masculinity—What it Means to be a Man?" The court found a violation of the teacher's First Amendment rights, and stated that the state may only control a teacher's academic freedom if the classroom speech has a material or substantial disruptive effect. Likewise, in *Webb v. Lake Mills Community School District*, 344 F. Supp. 791 (N.D. Iowa 1972), where a high school drama teacher was fired for selecting plays which displayed scenes of vulgarity and drunkenness, the court found for the teacher, holding it was arbitrary and capricious to fire a teacher for selecting plays which were in conformity with the rules as stated to her and did not have a disruptive effect. And in *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970), a probationary high school teacher was fired for assigning a story written by Kurt Vonnegut, Jr. The court found that the defendants failed to demonstrate that assignment was not appropriate reading and was disruptive.

This court finds that while the outcome of these cases may well have been appropriate, the standards of review stated do not provide for sufficient deference to the judgment of the school administrations. In *Parducci*, the court placed the burden on the school to prove that the assigned materials were both inappropriate and disruptive. Yet, as was stated earlier, some measure of deference must be accorded to the judgment of the school as to the appropriateness of curriculum materials. Also, the school should not have to show that assigned materials were disruptive. The court is uncertain of what is meant by "disruptive" in this context. Perhaps "disruption" refers to complaints. Perhaps it refers to wild behavior by the students. Yet, a school should be able to find materials inappropriate for the classroom even if the students quietly acquiesce to the use of the materials. For example, a school could fire a teacher for showing hard core pornography or an X-rated movie, even in the unlikely event that the students happen to unanimously approve of the idea, and watch quietly and attentively. Likewise, *Webb* and *Dean* seem to state that a disruptive effect is necessary to fire a teacher for use of materials not in violation of any preexisting rule, regardless of the appropriateness of the material. Again, the court rejects this standard.

Not all cases addressing the issue of after the fact firings have held that First Amendment rights have been violated. In *Brubaker v. Board of Education*, 502 F.2d 973 (7th Cir. 1974) (*en banc*), three nontenured elementary school teachers were fired for distributing a poem entitled "Getting Together" to eighth grade students. The district court found for the school, stating that the school's determination that the poem was unsuitable reading was not "wholly unsupported in fact or without reason." The Seventh Circuit affirmed the outcome, but expressly refused to state a standard of review; the court found it unnecessary to state a standard of review, as it felt that a thorough recitation of the facts made it clear that the plaintiff's First Amendment rights had not been violated in that case. Moreover, the court implied a rejection of the standard stated by the district court. Thus, *Brubaker* does not supply us with a standard of review.

In *Parker v. Board of Education*, 237 F. Supp. 222 (D. Md. 1965), *aff'd on other grounds*, 348 F.2d 464 (4th Cir. 1965); a probationary high school teacher was fired for assigning Aldous Huxley's book entitled *A Brave New World*. The County Board's reading list contained the book, along with a caution that "a great care [should] be taken in making book assignments." The court dealt with the prior notice issue by stating that the school had the right to require that the teacher adhere to the caution on the reading list. The court further noted that the plaintiff had cited no case supporting his First Amendment claim (this case preceded all other cases cited in this opinion). Thus, the court gave great deference to the school's after the fact determination that assignment of the book was inappropriate, providing no discussion whatsoever of the value or offensiveness of the book. This court is unwilling to state a rule that the school may fire a teacher after the fact, without prior notice beyond a general "use appropriate discretion" type of standard (which the court considers to be akin to no standard at all, as stated earlier), without *any* review of the nature of the material in question. Such a rule could create a "pall of orthodoxy" over the classroom, stifling innovation and encouraging teachers to take the "safe route." Such a rule would violate the dictates of *Keyishian* [*v. Board of Regents*, 385 U.S. 589 (1967)].

Therefore, the court is left without a clear standard of review. In seeking the appropriate standard, the court will consider the relevant concerns, gleaned from the above discussion. We begin by noting that schools should not be allowed to fire teachers after the fact for classroom expression, in absence of notice that the expression was prohibited, without some review by the courts. "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'" Therefore, to forbid a teacher from using a particular item in the classroom is less restrictive of a teacher's creativity and experimentation than a requirement of "appropriate judgment." Such a vague standard has the effect of forcing teachers to guess what is permissible, thus encouraging teachers to avoid innovation and to take the safe, standard route. Consequently, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." Thus, the standard of reviewing schools' after the fact firings should be less deferential than the ones stated by the district courts in *Brubaker* and *Parker*; it should be less deferential than the standard of reviewing schools' prior regulations which give notice of what material may not be used in the classroom.

The court also believes that an appropriate standard of review would consider the severity of the sanction imposed upon the teacher . . . because the severity of the sanction is proportional to the chilling effect. If a teacher with an otherwise unblemished record were fired for using a controversial teaching method, the chilling effect would be great. If, on the other hand, that teacher merely received a written warning, the chilling effect would be much less.

Finally, the court reiterates that deference must be given to the judgment of the school administration, for all the reasons given in the earlier discussion of the need to allow school administrations to establish the contents of the curriculum. While a school board is "not free to fire teachers for every random comment in the classroom," [i]t is the duty of the teacher to be cognizant of and sensitive to the feelings of his students, their parents, and their community." It is the function of the school administration to see to it that teachers fulfill this duty. Therefore, the standard of review should be more deferential to the school than those stated in *Cooper*, *Mailloux*, *Sterzing*, *Keefe*, *Dean*, *Webb*, and *Parducci*.

Considering all these factors, the court adopts the following standard of review: was it reasonable for the school not to enter into a new one year employment contract with the teacher for showing the film. Whether it was reasonable depends upon two factors. The first is whether the school could reasonably find that showing the film offended the "legitimate pedagogical concerns" of the school, given the considerations stated in the earlier discussion of the school's right to establish the contents of the curriculum. The second factor is the severity of the sanction. Thus, the standard stated here is less deferential than a standard of "could a reasonable person find the assigned material inappropriate." In some situations, materials used could be deemed inappropriate, yet termination would be unreasonable. It is not reasonable to fire a teacher for *any* indiscretion; the indiscretion must be of significant enough importance to justify such a severe sanction. The standard adopted here provides for substantial deference to the judgment of the school administration, yet tempers that deference with a recognition of the chilling effect that results from so severe a sanction when no previously publicized rule is violated.

Applying this standard to the case before the court, and keeping in mind the standard of substantial likelihood of success on the merits, as it relates to the motion for a preliminary injunction, the court finds that there is not a substantial likelihood that plaintiff will be able to demonstrate the school's decision not to enter into a new one year contract with her was unreasonable. The court expresses no opinion of whether it agrees with the decision. Rather, the court finds that the extent of the vulgarity and sexual explicitness in the film was such that it is likely that the evidence will demonstrate that the school could reasonably have determined that its showing was a serious indiscretion. The school could further reasonably have found that the length of the film indicates that its showing was more than an inadvertent mistake or a mere slip of the tongue, but rather was a planned event, and thus indicated that the teacher's approach to teaching was problematic. . . .

10.5 PROCEDURAL DUE PROCESS

In establishing the existence of one of the state statutory grounds for dismissal, the school board must follow certain procedures. The Constitution, as the supreme law of the land, lays down the minimum procedural requirements that all dismissals must satisfy. State statutory law and local policy must at least comply with these minimum requirements, but states and school districts may and often do adopt additional or stronger procedural requirements than the Constitution requires. Local school district procedures regarding teacher firings may be found in individual teacher contracts, collective bargaining agreements, or the policy statements of local school boards. Whatever their source, school district procedures must be consistent with state requirements.

Two Supreme Court cases, decided at the same time, deal with the issue of when the Constitution requires due process for teacher dismissals. Although these are higher education cases, the same principles apply in the lower schools. The first case, *Board of Regents of State Colleges v. Roth*,[76] involved a teacher who was not rehired after his first year of teaching at a public college. He was not given a hearing or any statement of reasons, but was simply informed that his contract would not be renewed. The second case, *Perry v. Sindermann*,[77] also involved a state college's nonrenewal without a hearing of a nontenured teacher, but this time one who had been working in the system for ten years. Both teachers claimed that they should have been entitled to a hearing under the Due Process Clause of the Fourteenth Amendment.

In finding against Roth but in favor of Sindermann, the Supreme Court drew important distinctions between the two cases. The Fourteenth Amendment only requires due process when the state seeks to deprive a person of property or liberty. But Roth had been given no promise of employment beyond the duration of his contract or any reason to expect that he would be rehired. Nor had the nonrenewal been handled in such a manner as to jeopardize Roth's reputation or his prospects for employment elsewhere. Thus, he had no property or liberty interest at stake and no constitutional claim to due process. By contrast, Sindermann's school had a written policy and longstanding practice of rehiring its teachers as long as their "teaching services are satisfactory." Furthermore, although Sindermann had not been formally notified of the reasons for his nonrenewal, the college had issued a press release "setting forth allegations of [his] insubordination," thus damaging his reputation as a teacher. Unlike Roth, Sindermann did have a property interest in continued employment and a liberty interest in restoring his reputation and, therefore, a constitutional right to due process. All teachers have a property interest in continued employment for the duration of their contracts. Furthermore, the effect of state tenure and continuing contract statutes is to grant a legally enforceable expectation of continued employment to teachers who have been hired beyond the probationary period.

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[76] 408 U.S. 564 (1972).

[77] 408 U.S. 593 (1972).

However, *Roth* and *Sindermann* indicate that not every personnel action entails a constitutional right to due process. Unless due process is specifically mandated by state statute, the nonrenewal of a probationary teacher's contract usually does not require a formal hearing or even notification of reasons. By contract, custom, statute, and even definition, probationary teachers do not have a legal expectation of continued employment or reemployment; probationary teachers do not have a property interest in their jobs beyond the expiration date of their contract. As the Court said in *Roth*, "abstract need or desire" or "unilateral expectation" is not enough to establish a property right. Unless state law or district policy specifically grants them due process, probationary teachers usually succeed in establishing a property right to employment only if they are dismissed in the middle of their contract or, as in *Sindermann*, if there exists a de facto policy that creates the equivalent of tenure.

As discussed in *Roth*, personnel actions taken in retaliation for speech activities require due process, "whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Roth* also suggests that actions that might seriously damage a teacher's reputation or standing within the community or impair prospects for future employment also may be viewed as deprivations of liberty requiring due process. Thus, teachers, whether tenured or not, have occasionally succeeded in claiming that transfers, demotions, failure to provide salary increases, failure to grant tenure, or temporary suspensions should have been accompanied by procedural protections. This is most likely to occur when an adverse decision is based on publicly made charges. Charges of intoxication, racism, and mental instability have been found sufficiently stigmatizing to require due process.[78] In other cases, however, allegations of poor job performance such as incompetence, inadequacy, and insubordination have not been found to require due process.[79]

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[78] McKnight v. Southeastern Pa. Transp. Auth., 583 F.2d 1229 (3d Cir. 1978); Wellner v. Minnesota State Junior College Bd., 487 F.2d 153 (8th Cir. 1973); Bomhoff v. White, 526 F. Supp. 488 (D. Ariz. 1981).

Once it is decided that a teacher has a right to procedural due process, the question becomes: What process is due? In *Cleveland Board of Education v. Loudermill*,[80] the Supreme Court considered the issue of whether the Constitution requires specific due process procedures for tenured public employees such as teachers in addition to the due process rights that may be specified by state law. Although the Court recognized that the government may have a significant "interest in quickly removing an unsatisfactory employee," it nevertheless ruled that a tenured employee's interest in avoiding unwarranted dismissal was important enough to require at least a minimal opportunity for a pretermination hearing. The minimum constitutional requirements for the hearing are similar to those afforded to a student prior to suspension from school: "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

Loudermill makes clear that the Constitution imposes due process procedures independent of the requirements of state law. Where state law specifies post-termination procedures adequate to "definitively resolve the propriety of the discharge," pretermination proceedings need not be elaborate. All that is required is some notice of the charges and supporting evidence and an opportunity to refute them. An investigation, no matter how thorough cannot substitute for a hearing. Thus, a teacher who was suspended for four days and then transferred following an investigation for possible child abuse but without a hearing successfully claimed that his due process rights had been violated. The court ruled that the suspension and transfer implicated both property and liberty interests thereby requiring an opportunity to present evidence and cross examine adverse witnesses.[81]

Loudermill does not fully specify the level of due process required when educational employment contracts are terminated. In teacher dismissal cases, state statutes generally require advanced notice of the charges and a hearing before an impartial tribunal. To satisfy constitutional and statutory requirements, the notice must be given sufficiently in advance of the hearing and be sufficiently precise to allow preparation of a defense.[82] In one case, a notice informing a teacher being charged with "insubordination based upon the fact you refuse to cooperate with the principal of your school" was found to be inadequate.[83] Similarly, merely charging a teacher with "incompetence" is not adequate notice.[84] To satisfy due process requirements, the notice should support its charges with indications of the specific unacceptable behaviors and deficiencies. Careful crafting of charges is important also because the hearing may not consider charges not listed in the notice or evidence not relevant to those charges.

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[79] Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975); Beitzell v. Jeffery, 643 F.2d 870 (1st Cir. 1981).

[80] 470 U.S. 532 (1985).

[81] Winegar v. Independent Community Sch. Dist., 20 F.3d 895 (8th Cir. 1994).

[82] Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977); Benton v. Board of Educ. of Winnebago, 361 N.W.2d 515 (Neb. 1985); Hawkins v. Board of Pub. Educ. in Wilmington, 468 F. Supp. 201 (D. Del. 1979).

[83] Osborne v. Bullitt County Bd. of Educ., 415 S.W.2d 607 (Ky. Ct. App. 1967).

[84] Board of Educ. of Clarke County v. Oliver, 116 So. 2d 566 (Ala. 1959).

Due process requires that the outcome of the hearing be determined by impartial decision makers. Impartiality may be questioned if the decision maker has a conflict of interest, harbors personal animosity toward the employee, prejudges the case, acts as both judge and "prosecutor," meets with the "prosecutor" or others with interests opposed to the employee outside the hearing, or considers evidence not presented at the hearing. The following case considers the impartiality of a school board in dismissing teachers engaged in an illegal strike.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 v. HORTONVILLE EDUCATION ASSOCIATION

Supreme Court of the United States, 1976
426 U.S. 482

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted certiorari in this case to determine whether School Board members, vested by state law with the power to employ and dismiss teachers, could, consistent with the Due Process Clause of the Fourteenth Amendment, dismiss teachers engaged in a strike prohibited by state law.

I.

The petitioners are a Wisconsin school district, the seven members of its School Board, and three administrative employees of the district. Respondents are teachers suing on behalf of all teachers in the district and the Hortonville Education Association (HEA), the collective-bargaining agent for the district's teachers.

During the 1972–1973 school year Hortonville teachers worked under a master collective-bargaining agreement; negotiations were conducted for renewal of the contract, but no agreement was reached for the 1973–1974 school year. The teachers continued to work while negotiations proceeded during the year without reaching agreement. On March 18, 1974, the members of the teachers' union went on strike, in direct violation of Wisconsin law. On March 20, the district superintendent sent all teachers a letter inviting them to return to work; a few did so. On March 23, he sent another letter, asking the 86 teachers still on strike to return, and reminding them that strikes by public employees were illegal; none of these teachers returned to work. After conducting classes with substitute teachers on March 26 and 27, the Board decided to conduct disciplinary hearings for each of the teachers on strike. Individual notices were sent to each teacher—setting hearings for April 1, 2, and 3.

On April 1, most of the striking teachers appeared before the Board with counsel. Their attorney indicated that the teachers did not want individual hearings, but preferred to be treated as a group. Although counsel agreed that the teachers were on strike, he raised several procedural objections to the hearings. He also argued that the Board was not sufficiently impartial to exercise discipline over the striking teachers and that the Due Process Clause of the Fourteenth Amendment required an independent, unbiased decisionmaker. An offer of proof was tendered to demonstrate that the strike had been provoked by the Board's failure to meet teachers' demands, and respondents' counsel asked to cross-examine Board members individually. The Board rejected the request, but permitted counsel to make the offer of proof, aimed at showing that the Board's contract offers were unsatisfactory, that the Board used coercive and illegal bargaining tactics, and that teachers in the district had been locked out by the Board.

On April 2, the Board voted to terminate the employment of striking teachers, and advised them by letter to that effect. However, the same letter invited all teachers on strike to reapply for teaching positions. One teacher accepted the invitation and returned to work; the Board hired replacements to fill the remaining positions.

Respondents then filed suit against petitioners in state court, alleging, among other things, that the notice and hearing provided them by the Board were inadequate to comply with due process requirements. The trial court granted the Board's motion for summary judgment on the due process claim. The court found that the teachers, although on strike, were still employees of the Board under Wisconsin law and that they retained a property interest in their positions under this Court's decisions in *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Board of Regents v. Roth*, 408 U.S. 564 (1972). The court concluded that the only question before the Board on April 1 and 2 was whether the teachers were on strike in violation of state law, and that no evidence in mitigation was relevant. It rejected their claim that they were denied due process, since the teachers admitted they were on strike after receiving adequate notice and a hearing, including the warning that they were in violation of Wisconsin law.

On appeal, the Wisconsin Supreme Court reversed. On the single issue now presented it held that the Due Process Clause of the Fourteenth Amendment to the Federal Constitution required that the teachers' conduct and the Board's response be evaluated by an impartial decisionmaker other than the Board. The rationale of the Wisconsin Supreme Court appears to be that although the teachers had admitted being on strike, and although the strike violated Wisconsin law, the Board had available other remedies than dismissal, including an injunction prohibiting the strike, a call for mediation, or continued bargaining. Relying on our holding in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Wisconsin court then held "it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decision maker be charged with the responsibility of determining what action shall be taken on the basis of those facts." The court held that the Board was not sufficiently impartial to make this choice: "The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board." In reaching its conclusion, the court acknowledged that the Board's decision could be reviewed in other forums; but no reviewing body would give the teachers an opportunity to demonstrate that "another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decision maker."

Since it concluded that state law provided no adequate remedy, the Wisconsin Supreme Court fashioned one it thought necessary to comply with federal due process principles. To leave with the Board "[a]s much control as possible . . . to set policy and manage the school," the court held that the Board should after notice and hearing make the decision to fire in the first instance. A teacher dissatisfied with the Board's decision could petition any court of record in the county for a *de novo* hearing on all issues; the trial court would "resolve any factual disputes and provide for a reasonable disposition." The Wisconsin Supreme Court recognized that this remedy was "not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body." But it would suffice "until such time and only until such time as the legislature provides a means to establish a forum that will meet the requirements of due process."

We granted certiorari because of the state court's reliance on federal due process. We reverse.

II.

The Hortonville School District is a common school district under Wisconsin law, financed by local property taxes and state school aid and governed by an elected seven-member School Board. . . . The Board is the only body vested by statute with the power to employ and dismiss teachers.

The sole issue in this case is whether the Due Process Clause of the Fourteenth Amendment prohibits this School Board from making the decision to dismiss teachers admittedly engaged in a strike and persistently refusing to return to their duties. The Wisconsin Supreme Court held that state law prohibited the strike and that termination of the striking teachers' employment was within the Board's statutory authority. We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the State. The only decision remaining for the Board therefore involved the exercise of its discretion as to what should be done to carry out the duties the law placed on the Board.

A.

Respondents argue, and the Wisconsin Supreme Court held, that the choice presented for the Board's decision is analogous to that involved in revocation of parole in *Morrissey v. Brewer*, that the decision could be made only by an impartial decisionmaker, and that the Board was not impartial. In *Morrissey* the Court considered a challenge to state procedures employed in revoking the parole of state prisoners. There we noted that the parole revocation decision involved two steps: First, an inquiry whether the parolee had in fact violated the conditions of his parole; second, determining whether the violations found were serious enough to justify revocation of parole and the consequent deprivation of the parolee's conditional liberty. . . . Nothing in this case is analogous to the first step in *Morrissey*, since the teachers admitted to being on strike. But respondents argue that the School Board's decision in this case is, for constitutional purposes, the same as the second aspect of the decision to revoke parole. The Board cannot make a "reasonable" decision on this issue, the Wisconsin Supreme Court held and respondents argue, because its members are biased in some fashion that the due process guarantees of the Fourteenth Amendment prohibit. . . .

B.

Respondents' argument rests in part on doctrines that have no application to this case. They seem to argue that the Board members had some personal or official stake in the decision whether the teachers should be dismissed, comparable to the stake the Court saw in *Tumey v. Ohio*, 273 U.S. 510 (1927), or *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); see also *Gibson v. Berryhill*, 411 U.S. 564 (1973), and that the Board has manifested some personal bitterness toward the teachers, aroused by teacher criticism of the Board during the strike, see, *e.g.*, *Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). Even assuming that those cases state the governing standards when the decisionmaker is a public employer dealing with employees, the teachers did not show, and the Wisconsin courts did not find, that the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest, and there is nothing in the record to support charges of personal animosity. The Wisconsin Supreme Court was careful "not to suggest . . . that the board members were anything but dedicated public servants, trying to provide the district with quality education . . . within its limited budget." That court's analysis would seem to be confirmed by the Board's repeated invitations for striking teachers to return to work, the final invitation being contained in the letter that notified them of their discharge.

The only other factor suggested to support the claim of bias is that the School Board was involved in the negotiations that preceded and precipitated the striking teachers' discharge. Participation in those negotiations was a statutory duty of the Board. The Wisconsin Supreme Court held that this involvement, without more, disqualified the Board from deciding whether the teachers should be dismissed:

> The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. . . . They were . . . not uninvolved in the events which precipitated decisions they were required to make.

Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances."

Respondents' claim and the Wisconsin Supreme Court's holding reduce to the argument that the Board was biased because it negotiated with the teachers on behalf of the school district without reaching agreement and learned about the reasons for the strike in the course of negotiating. From those premises the Wisconsin court concluded that the Board lost its statutory power to determine that the strike and persistent refusal to terminate it amounted to conduct serious enough to warrant discharge of the strikers. Wisconsin statutes vest in the Board the power to discharge its employees, a power of every employer, whether it has negotiated with the employees before discharge or not. The Fourteenth Amendment permits a court to strip the Board of the otherwise unremarkable power the Wisconsin Legislature has given it only if the Board's prior involvement in negotiating with the teachers means that it cannot act consistently with due process.

C.

Due process, as this Court has repeatedly held, is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it. Our assessment of the interests of the parties in this case leads to the conclusion that this is a very different case from *Morrissey v. Brewer*, and that the Board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law be discharged.

The teachers' interest in these proceedings is, of course, self-evident. They wished to avoid termination of their employment, obviously an important interest, but one that must be examined in light of several factors. Since the teachers admitted that they were engaged in a work stoppage, there was no possibility of an erroneous factual determination on this critical threshold issue. Moreover, what the teachers claim as a property right was the expectation that the jobs they had left to go and remain on strike in violation of law would remain open to them. The Wisconsin court accepted at least the essence of that claim in defining the property right under state law, and we do not quarrel with its conclusion. But even if the property interest claimed here is to be compared with the liberty interest at stake in *Morrissey*, we note that both "the risk of an erroneous deprivation" and "the degree of potential deprivation" differ in a qualitative sense and in degree from those in *Morrissey*.

The governmental interests at stake in this case also differ significantly from the interests at stake in *Morrissey*. The Board's decision whether to dismiss striking teachers involves broad considerations, and does not in the main turn on the Board's view of the "seriousness" of the teachers' conduct or the factors they urge mitigated their violation of state law. It was not an adjudicative decision, for the Board had an obligation to make a decision based on its own answer to an important question of policy: What choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it? The Board's decision was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well.

State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike; by virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform. Second, the state legislature has given to the Board the power to employ and dismiss teachers, as a part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.

III.

Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power. Accordingly, we hold that the Due Process Clause of the Fourteenth Amendment did not guarantee respondents that the decision to terminate their employment would be made or reviewed by a body other than the School Board.

The judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[Stewart dissented, joined by Brennan and Marshall]

* * *

Hortonville tolerates decision makers with prejudgments on what constitutes sufficient grounds for dismissal or other policy matters, but prejudgment of the facts or the outcome of a specific case violates due process.[85] Courts will disqualify decision makers when there is proof of actual bias or prejudice. Bias on the part of one member of a dismissal hearing panel is enough to taint the entire process.[86] In one case, a member of a teacher dismissal hearing panel asked for and received extra compensation from the school board. The court ruled that the extra compensation created an appearance of impropriety sufficient to indicate a violation of the teacher's right to an impartial hearing.[87] A history of heated exchanges between the employee and decision maker is not usually enough to prove bias.[88]

Some states permit or require local school boards to conduct teacher dismissal hearings and others require an independent hearing officer or panel selected according to specified procedures. For example, New York law requires that the hearing panel be made up of three nondistrict employees picked by the school board and teacher from a list of state-approved hearing officers. Other states allow the teacher and school board each to designate one member of a three-member panel. The first two members must then jointly choose the third. Another method is to have the state provide a list of qualified hearing officers. The list is passed back and forth between teacher and school board, each in turn crossing out one name until the last remaining name is designated to hear the case.

One potentially conflictive aspect of the hearing process is the role of the prosecutor. Plaintiffs sometimes question the impartiality of the school board when the case against the teacher is presented by the board's own regular attorney; however, courts have rejected this claim.[89] More troublesome for the courts is when the school's attorney or other official involved in prosecuting the case joins the board in its deliberations. When this occurs the prosecution gets a second chance to influence the board without the defense being given an equivalent opportunity. As unfair as this practice may seem, the courts have split regarding its permissibility.[90]

State statutes may grant teachers the right to an attorney or other representative in dismissal hearings. Where no statute exists, a majority of the few courts that have considered the issue have concluded that teachers do have a right to counsel.[91]

Courts also protect an accused teacher's right to confront and cross-examine witnesses, to receive a tape or transcript of the hearing, and to receive a written or oral statement of reasons for the decision.[92] Many states' laws grant the right to appeal the decision of the local board or hearing panel to the state commissioner of education or some other administrative agency. Subject to certain conditions, appeals may also be taken to the courts. The most important condition is that courts will not usually hear appeals unless all administrative remedies afforded by state law or local policy have been exhausted.

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[85] Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977).

[86] Crump v. Board of Educ. of Hickory Admin. Sch. Unit, 392 S.E.2d 579 (N.C. 1990).

[87] Syquia v. Board of Educ., 579 N.Y.S.2d 487 (App. Div. 1992).

[88] Simard v. Board of Educ. of Groton, 473 F.2d 988 (2d Cir. 1973).

[89] Niemi v. Board of Educ., 303 N.W.2d 105 (Mich. Ct. App. 1981).

[90] Kinsella v. Board of Educ. of Amherst & Towanda, 378 F. Supp. 54 (W.D.N.Y. 1974), *aff'd*, 542 F.2d 1165 (2d Cir. 1976); White v. Board of Educ., 501 P.2d 358 (Haw. 1972); Miller v. Board of Educ. of Sch. Dist. No. 132, Cook County, 200 N.E.2d. 838 (Ill. App. Ct. 1964).

[91] Cochran v. Chidester Sch. Dist., 456 F. Supp. 390 (W.D. Ark. 1978); Doe v. Anker, 451 F. Supp. 241 (S.D.N.Y. 1978), *remanded*, 614 F.2d 1286 (2d Cir. 1979); Frumkin v. Board of Trustees, Kent State Univ., 626 F.2d 19 (6th Cir. 1980).

[92] McGree v. Draper, 564 F.2d 902 (10th Cir. 1977), *appeal after remand*, 639 F.2d 639 (10th Cir. 1981).

10.6 REDUCTION IN FORCE

Reduction in force (RIF) refers to dismissal because of financial exigency, declining enrollment, or a decision to discontinue a particular program or service. Realignment of the work force, including transfers and demotions for economic reasons, is governed by different statutes than those governing nonrenewal of probationary teachers, dismissals for cause, and disciplinary transfers and demotions. Many states' statutes require RIF dismissals in reverse order of seniority.

Other states take different approaches. Nebraska law provides that before a school board may dismiss a teacher as part of a RIF, the board must have proof that a change in circumstances necessitated the reduction, the change in circumstances specifically related to the affected teacher, and there are no vacancies for which the teacher is qualified.[93] The West Virginia Supreme Court rejected the view that state law required that a RIF be done strictly according to seniority. The court ruled that the board must also consider years of teaching experience in a given subject area.[94] Collective bargaining agreements may also affect RIF policies and procedures.

Legal challenges to RIFs include claims that:

- Economic circumstances or drops in enrollment did not justify the RIF.[95]
- Abolition of a position did not in fact occur; instead, the same position was retained under a different title.[96]
- The RIF prevented the provision of mandated services or improperly affected the quality of the education program.[97]
- The order of dismissal violated seniority or other statutory mandate.[98]
- A demotion as part of the RIF plan was arbitrary and violated seniority rights.[99]
- The statutorily prescribed order of reinstatement and recall was violated.[100]

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[93] Nickel v. Saline County Sch. Dist. No. 163, 559 N.W.2d 480 (Neb. 1997).
[94] State *ex rel.* Melchiori v. Board of Educ., 425 S.E.2d 251 (W. Va. 1992).
[95] Laird v. Independent Sch. Dist. No. 317, 346 N.W.2d 153 (Minn. 1984).
[96] Baron v. Mackreth, 260 N.E.2d 554 (N.Y. 1970).
[97] Geduldig v. Board of Educ. of N.Y., 351 N.Y.S.2d 167 (App. Div. 1974).
[98] Peck v. Independent Sch. Dist. No. 16, 348 N.W.2d 100 (Minn. Ct. App. 1984).
[99] Green v. Jenkintown Sch. Dist., 441 A.2d 816 (Pa. Comwlth. Ct. 1982).
[100] Massey v. Argenbright, 683 P.2d 1332 (Mont. 1984).

- RIF procedures violated statutory due process requirements.[101]
- RIF procedures violated contractual requirements.[102]
- The RIF policy was racially discriminatory.

10.7 LEAVES OF ABSENCE

School boards have the authority to grant leaves of absences for personal reasons such as illness, for professional reasons such as to pursue additional training, or for public service such as military or jury duty. Boards also have the authority to impose involuntary leave on teachers who are physically or mentally unfit if the teachers' procedural due process rights are satisfied.[103] Boards may not, however, grant a leave that constitutes a gift of public money to a private individual.

Litigation concerning a leave of absence may involve the claim that a school board violated its own policy, the collective bargaining agreement, state statute, federal antidiscrimination law, or the Constitution. In 1974, the Supreme Court ruled that mandatory pregnancy or postpartum leaves of absence violate the teachers' right of privacy.[104] Federal antidiscrimination laws prohibit treating pregnancy differently from other disabilities, such as not allowing pregnant teachers to use sick leave. Federal law also prohibits religious discrimination in the administration of a personal leave policy.

10.8 WORKERS' COMPENSATION

Teachers injured on the job have two possible paths to compensation from their school district. If the teacher's injury results from careless, reckless, or intentionally wrongful behavior on the part of the district or another of its employees, the teacher may be able to sue the district for negligence or another tort (see chap. 12); however, such suits may only be brought for injuries that are not eligible for redress under the system known as "workers' compensation."

In most, but not all states, teachers are covered by workers' compensation statutes. Although workers' compensation laws vary from state to state, all are designed to provide compensation to employees for on-the-job injuries regardless of whether their employers were negligent. The idea is that employers should be responsible for the harm suffered by employees in the course of conducting their employer's business. In most states, an employee's injury resulting from the intentionally wrongful behavior of the employer or a coworker (see sec. 12.1) is not covered by workers' compensation, but workers' compensation is the exclusive remedy for injuries caused by simple negligence (see sec. 12.4) on the part of an employer.

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[101] Palone v. Jefferson Parish Sch. Bd., 306 So. 2d 679 (La. 1975).

[102] Law v. Mandan Pub. Sch. Dist., 411 N.W.2d 375 (N.D. 1987).

[103] Newman v. Board of Educ. of N.Y., 594 F.2d 299 (2d Cir. 1979).

[104] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

To be eligible for compensation, a teacher or any employee must prove the existence of three elements: an injury by accident, arising out of, and in the course of, employment.

At one time, the accident requirement meant that the employee had to prove the occurrence of a sudden impact related to something other than routine work. Occupational diseases and back injuries or hernias suffered during routine lifting were excluded from coverage. In recent years, this narrow notion of an accident has given way to a broader interpretation so that now teachers may also seek compensation for injuries that developed slowly over time or are caused by routine tasks, such as lifting books. Teachers are also covered if preexisting conditions are aggravated by their work. Thus an on-the-job heart attack may be compensable even if it results in part from years of unhealthy living. However, some states will not require workers' compensation to cover heart attacks unless caused by work stress greater than most people experience during normal daily living. Under some conditions, job-induced mental illness and even stress may be compensable. Harassment of any kind—sexual, racial, or just personal animosity—is a common source of compensable stress. In one case, a teacher successfully claimed workers' compensation after being falsely accused of sexually harassing a student.[105] However, unless the employer acts unreasonably, claims for compensation for stress arising from overwork, discipline, denial of promotion, layoff, or discharge are usually denied. For example, one court refused to allow a claim for work-related mental stress because there was no proof that the claimant's particular working conditions were uniquely stressful (she supervised bus routes and other transportation related matters). The court noted that there was no evidence to suggest that the stress the claimant experienced was the result of anything other than her own mismanagement of the position.[106]

Once the accident element is proven, a teacher claiming workers' compensation must next show that the injury arose out of the job of teaching. In most states, to satisfy this element, the teacher must show that the act of doing the job increased the probability of the injury. For example, this element can usually be proven in the case of a teacher injured by a student's assault because teaching increases the likelihood of being assaulted.

The final element of a workers' compensation claim is to show that the injury occurred in the course of employment. This element focuses on where the injury occurred and what the employee was doing at the time. Hence, a teacher who is injured in a car accident while commuting to work would not be covered, but once the teacher crosses the school's property line the commute is over and coverage begins. Teachers injured while driving off campus on school business would also be covered. A teacher may lose coverage by engaging in willful misconduct, such as being drunk or disobeying the law or the school's rules.

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[105] Crochiere v. Board of Educ., 630 A.2d 1027 (Conn. 1993).
[106] King v. Board of Educ., 716 A.2d 1077 (Md. Ct. Spec. App. 1998).

In most states, the workers' compensation system operates outside the regular court system. Claims must be prosecuted through an administrative agency created specifically for that purpose. Some states have a separate agency for public employees like teachers. In most states, a claim is first decided by a hearing officer, and both sides have the option of appealing to the full agency. The agency's decisions may then be appealed to a court on either procedural or substantive grounds. All states' workers' compensation systems require the employee promptly to notify the employer of any injury and establish time limits and procedures for filing claims. Failure to satisfy these requirements will result in denial of claims. Successful claims may result in compensation for medical expenses, rehabilitation, lost wages, disability, or disfigurement, or death benefits to surviving dependents, but there is a limit to the amount that may be awarded, and no punitive damages are allowed. Monetary damages under workers' compensation are usually less than they would have been if a successful tort suit could have been brought.[107]

10.9 SUMMARY

Most of the law relevant to the hiring and firing of professional school employees is found in state statutes. States are free to set whatever teacher certification requirements they wish, except that standards may not be arbitrary, racially discriminatory, or otherwise violative of constitutional rights. Because certification does not amount to a contractual agreement, states may also set new standards for certification retention even by "life-certificated" employees.

For their part, schools are free to offer employment to whomever they deem most qualified, provided that the candidate meets state eligibility requirements, including certification and that the hiring process does not violate federal constitutional or statutory provisions. Once hired, teachers may be assigned to any school, grade level, or subject matter for which they are qualified unless their contract says otherwise. They may also be assigned extra duty and tasks reasonably connected to the legitimate educational goals of the school and their job, again subject to contractual constraints.

Schools also have wide latitude in the evaluation and contract renewal decision concerning probationary teachers. In many states, a school may decide not to renew the contract of a teacher in the first three years of employment for any constitutionally permissible reason and without granting a hearing or following any specific procedures. It may not even be necessary to reveal the reasons for the decision to the teacher. Recently, about half the states have instituted some guidelines regarding the decision not to renew a beginning teacher. Generally, these amount to requirements that the teacher receive at least a minimal evaluation, that the reasons for the nonrenewal be given, and that the teacher have an opportunity to provide a rebuttal. Even in states with these requirements, districts are generally free to nonrenew for any constitutionally permissible reason, provided statutory procedural requirements are met.

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[107] Dudley v. Victor Lynn Lines, Inc., 161 A.2d 479 (N.J. 1960).

The situation regarding tenured teachers is quite different. Each state's statutes establish a list of the only acceptable bases for termination or nonrenewal of the contract of a teacher who has passed the probationary period. Although the wording varies considerably from state to state, acceptable causes for dismissal can be grouped into five categories: incompetence, violation of role model obligations, poor citizenship within the school, posing a threat to students, and incapacity. The law places the burden of proof on the school to show, in many states through a prescribed evaluation process, that the teacher falls into one of the dismissable categories. Unlike with probationary teachers, the law does not permit the firing of a tenured teacher to hire someone who is cheaper or better.

In addition to the requirement that dismissal be for a specified cause, both the Constitution and state statutes impose significant procedural due process requirements on tenured-teacher firings. In general, the Constitution requires an impartial hearing including a statement of charges and a reasonable opportunity to refute them. Most states' statutes specify additional procedures, often granting a right to counsel, to call and cross-examine witnesses, to receive a transcript of the proceedings, and to appeal. Because a great deal is at stake and the risk of litigation is very high, firings should comply with both the letter and spirit of all relevant law.

Reduction in force—dismissal of teachers because funds are lacking or programs eliminated—is also primarily controlled by state statute. Most of the litigation challenging a specific RIF is resolved by comparing the specific procedures employed with the requirements of state statutes. A common but not universal feature of these statutes is that more recently hired teachers be let go before those with greater seniority.

School boards may grant voluntary leaves of absence or impose involuntary leaves consistent with federal and state law and their own policies and contractual agreement. Leave-of-absence policies may not discriminate on the basis of race, religion, or pregnancy. Teachers injured at work may receive payment in accordance with the workers' compensation laws of their state. To be eligible for workers' compensation, a teacher must sustain an injury by accident arising out of and in the course of employment.

CHAPTER 11

COLLECTIVE BARGAINING, UNIONS, AND TEACHER CONTRACTS

Many facets of the relationship between a board of education and its teachers are regulated by the Constitution and federal and state statutes. Within the boundaries set by these laws, the terms and conditions of a teacher's employment are set by a contractual agreement. For more than three-fourths of teachers today, most of the terms of the agreement are determined through a process of collective bargaining in which a union represents and negotiates for all a district's teachers simultaneously. Ultimately, whether or not collective bargaining takes place, each teacher must enter into a contract with the employing board of education. This chapter considers the legal framework for collective bargaining and contract formation in education.

11.1 COLLECTIVE BARGAINING FOR TEACHERS: AN OVERVIEW

Since the late nineteenth century, collective bargaining has been politically and legally controversial in the United States. Until the 1930s, collective bargaining did not enjoy legal protection. In fact, private employers were able to use the law to suppress strikes, picketing, and even the formation of unions. However, following the 1932 election of President Franklin Roosevelt, a series of federal laws was enacted limiting the power of federal courts to issue injunctions against union activities, authorizing the formation of unions, and imposing on employers the legal duty to bargain collectively. Many states made similar changes in their own laws.

For several reasons, the emergence of collective bargaining in the public sector occurred more slowly. First, collective bargaining was seen as incompatible with the concept of government sovereignty and the principle that government decision making should be democratically controlled. Second, collective bargaining was viewed as a form of unlawful delegation of government authority. Third, collective bargaining in the public sector was criticized for skewing the normal political process in favor of one interest group to the disadvantage of others. Even today, some would argue that collective bargaining in education gives teachers too much power relative to parents and the community at large.

Even the authority of local school districts to engage in collective bargaining was in doubt. No statutes expressly authorized school districts to engage in collective bargaining, and the courts were split on the question of whether school districts could engage in collective bargaining without express statutory authorization.[1] Furthermore, when the authority to bargain was found, the courts concluded only that school boards were permitted to engage in collective negotiations, not that they were required to.

Public sector collective bargaining slowly gained recognition beginning in 1949 when Wisconsin enacted legislation permitting it. In 1962, President Kennedy issued an executive order giving federal employees some limited rights to bargain collectively. Today, most states have statutes authorizing some form of collective negotiations between teachers and school boards. In thirty-four states, actual collective bargaining is now required in districts where teachers have formed a union. Other states require only that the board meet and confer with the representative union. Collective bargaining by teachers is prohibited by statute in North Carolina.[2]

There are important variations in the provisions of public sector collective bargaining laws. For example, some states designate a wider range of topics as negotiable than others. Some states permit or require arbitration, whereas others prohibit arbitration. In short, some state legislatures have been more willing than others to encourage or force local school boards to share power with teacher unions.

Nevertheless, many states' collective bargaining laws have certain key features in common. At the heart of the standard public collective bargaining law are provisions specifically giving public employees the right to join a union and prohibiting public employers such as school boards from transferring or disciplining employees for engaging in union activities. These statutes also impose on the employer a duty to bargain with the union in good faith. This means, among other things, that the employer may not take unilateral action on certain categories of issues if the employee union wants to negotiate them.

Not every employee, however, may join a collective bargaining unit. State statutes often exclude supervisors, those in managerial positions, and even confidential employees who work for supervisors and managers.[3] School site management arrangements—depending on the authority delegated to the faculty—have the potential to turn a school's entire faculty into managers prohibited from joining a union.[4]

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[1] Norwalk Teachers Ass'n v. Board of Educ. of Norwalk, 83 A.2d 482 (Conn. 1951); Virginia v. County Bd. of Arlington County, 232 S.E.2d 30 (Va. 1977).

[2] N.C. Gen. Stat. §§95-98.

To get to the point of actually bargaining, several steps need to be taken. First, the bargaining unit must be defined. Different categories of employees have different interests in common, so more than one union may be necessary in one school district. The standard state law provides for a formal process to officially designate and recognize the bargaining units. Although these laws vary regarding the criteria for defining an appropriate bargaining unit, two criteria are generally used: Employees should be divided into as few separate bargaining units as possible and a bargaining unit should include only members who share a "community of interests." To combine employees with very different interests risks persistent internal union strife and compromises the union's ability to represent all its members fairly. However, too many different unions place an undue burden on the school district to engage in multiple collective-bargaining processes.

Many states' statutes establish a **public employment relations board (PERB)** with power to resolve disputes relating to union representation in education. Nevertheless, disputes over the makeup of education employee unions sometimes end up in court. A Michigan case decided that nonteaching coaches should not form a separate bargaining unit.[5] A Wisconsin court concluded that student teachers should be placed in the same unit with full- and part-time professional employees.[6] A federal court in Indiana recently rejected the claim that a school district's noncertified employees had a constitutional right to hold an election to see if they wanted to form a separate union from the district's teachers.[7]

Once the number and makeup of bargaining units have been decided, employees must be given an uncoerced opportunity to decide if they want to be collectively represented by a union, and, if so, which union. The school board may not unilaterally select the union.[8] Rather, state statutes typically establish several methods for making these decisions. One method, certification by the PERB without an election, can be used when there is no serious dispute over unionization. However, if there is any question regarding whether the employees want a union or which union they prefer, the PERB will supervise an election.

Although school officials may have a preference in these elections, state laws prohibit board domination, interference, or assistance in the formation, administration, or affairs of the employee union. Also, once a union has been victorious in an election, most states' statutes create a moratorium period during which its status as the exclusive representative of the unit may not be challenged or decertification sought. The purpose of this moratorium is to assure both employees and employer some period of labor peace and stability.

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[3] Michigan Educ. Ass'n v. Clare-Gladwin Intermediate Sch. Dist., 396 N.W.2d 538 (Mich. Ct. App. 1986); Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Mediation, 695 S.W.2d 894 (Mo. 1986) (en banc).

[4] *Cf.*, N.L.R.B. v. Yeshiva Univ., 444 U.S. 672 (1980).

[5] Michigan Coaches Ass'n v. Warren Consol. Sch., 326 N.W.2d 432 (Mich. Ct. App. 1982).

[6] Arrowhead United Teachers Org. v. Wisconsin Employment Relations Comm., 342 N.W.2d 709 (Wis. 1984).

[7] Indiana State Teachers Ass'n v. Board of Sch. Comm'r, 918 F. Supp. 266 (S.D. Ind., 1996), *aff'd*, 101 F.3d 1179 (7th Cir. 1996).

[8] Fayette County Educ. Ass'n v. Hardy, 626 S.W.2d 217 (Ky. Ct. App. 1980).

A minority of states permit certain arrangements to help protect what is called "union security." For example, some states permit an agency-shop arrangement under which, as a condition of continued employment, teachers must either be dues-paying union members or pay a service charge to the union. A few states permit the union-shop arrangement where teachers must actually be union members to retain employment. The closed-shop arrangement requires prospective employees to be union members at the time of application for employment. In contrast, about twenty states have enacted right-to-work laws prohibiting employers and unions from compelling employees to become union members or pay any fee. The relation between agency-shop arrangements and right-to-work laws was addressed in *North Kingstown v. North Kingstown Teachers Association.*[9]

In exchange for the privilege of becoming the exclusive representatives of the employees in the bargaining unit, state law imposes on the union a duty of fair representation. It must represent all the employees in the unit, members or not, and may not sacrifice the interests of those who have chosen not to join for the sake of its members.

When bargaining begins, both parties are obligated to bargain in good faith. This difficult-to-define concept imposes on the parties a duty to bargain with a sincere desire to reach an agreement but no obligation to make concessions. Legal mechanisms are established by statute for bringing and resolving charges that a party is not bargaining in good faith.

If the negotiators manage to come to an agreement, the contract must be ratified by a majority vote of both the school board and the teachers who will work under it. State law does not allow school boards to delegate to a negotiator the power to actually make a contract, so the board must act formally to ratify any agreement. Assuming ratification, which usually occurs, each teacher may then choose to accept the agreement or not. The only option for a teacher unwilling to work under the agreement is to resign. No teacher may negotiate a separate agreement with the board, except for supplemental contracts as permitted by statute and the collective bargaining agreement itself. No penalty may be imposed on a teacher who chooses to resign within a statutorily designated period after negotiation of the collective bargaining agreement.

In cases where negotiations do not produce a contract agreeable to both sides, states designate a variety of procedures designed to break the impasse. Again, depending on the specific provisions of state law, dispute-resolution schemes may include mediation, fact-finding, or arbitration (also called "interest arbitration"). All these involve the naming, either by a state official or jointly by the parties themselves, of an individual or board to help create a contract. A mediator's powers are limited to bringing the two sides together for continued talk and using human-relations skills to facilitate or coax agreement.

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[9] 297 A.2d 342 (R.I. 1972).

A fact finder may hold hearings where both sides are required to submit whatever information they possess regarding their contract proposals. The fact finder then issues a report containing recommendations of what the final contract should be. Although it is hoped that the view of a neutral labor relations expert, which in most cases is made public, will exert pressure on both sides to accept the proposed settlement, fact finder's reports may be and often are rejected by one or both sides.

An arbitrator has all the power of both mediator and fact finder, with the very important difference that the arbitrator's findings are binding on both sides. In other words, the arbitrator has the power to dictate a contract that may not be rejected by either union or board. In some schemes, arbitrators are limited to accepting the position of either one side or the other; other arbitration schemes allow the arbitrator to fashion a compromise. The legality of arbitration has been upheld against claims that it involves an unlawful delegation of power to private individuals and that it denies due process or equal protection to public employees.[10]

Arbitration is also controversial from a policy standpoint because it takes from the school board and ultimately from the people the board represents the final decision about how much they are willing to pay the teachers they employ. For this reason, arbitration has been adopted by only a few states. Arbitration may not be employed as part of the negotiation process in states where it has not been specifically authorized by statute.

Many states' statutes permit school boards to issue unilateral contracts if they are unable to come to terms with their teachers. In these states, after all other procedures have failed, the board will issue a contract that the union has no opportunity to ratify or reject as a group. Individual teachers still have the choice of working under the contract as offered, resigning, or, in some states, continuing to work under the previous year's contract.

State laws also contain provisions regarding the obligations of the parties when bargaining continues beyond the termination date of the previous contract. For example, courts have held that certain obligations under the old contract must be carried out by the employer during negotiations and impasse resolution, even after the old contract has come to an end. Specifically, employers have been ordered to provide salary experience increases between contracts in order to maintain the status quo pending a new agreement.[11]

In sum, state collective bargaining laws establish a set of rights and duties regarding union representation of school employees and collective bargaining. Violation of these laws is an unfair or improper labor practice that may result in an injunction, firing, or other penalty against the offending side. Unfair labor practices include: dismissal, transfer or discharge of employees for engaging in union activities; denial by the employer of the use of facilities for proper union activities; attempts by the union or employer to coerce an employee to vote a certain way in a certification election;

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[10] City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973).

[11] Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n, 456 N.E.2d 709 (Ind. 1983).

antiunion intimidation and harassment; unilateral changes by the employer in terms and conditions of employment; refusals to bargain or failure to bargain in good faith; union violation of the duty of fair representation; refusal to execute or implement a written agreement embodying the results of the bargaining process; refusal to enter into a legally mandated dispute resolution procedure; and engaging in an unlawful strike.

11.2 RIGHTS OF UNION MEMBERS

In the absence of state statutory authorization, do public employees have a constitutional right to join a union? In 1968, in *McLaughlin v. Tilendis*,[12] the Seventh Circuit ruled that the First Amendment prohibits any state or school district to forbid its teachers from joining a union or to dismiss those who do. The court explained its decision as follows:

> It is settled that teachers have the right of free association, and unjustified interference with teachers' associational freedom violates [their constitutional rights]. Public employment may not be subjected to unreasonable conditions, and the assertion of First Amendment rights by teachers will usually not warrant their dismissal. Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment.

The court rejected the argument that because some of the activities that unions often advocate and engage in, such as collective bargaining and teacher strikes, were (at that time and in that state) illegal, it was permissible for the state to prohibit union membership and even advocacy of union membership as well. The court relied on the important distinction between membership in an organization and participation in the illegal activities that the organization may advocate or even sponsor:

> It is possible of course that at some future time plaintiffs may engage in union-related conduct justifying their dismissal. But the Supreme Court has stated that, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." Even if this record disclosed that the union was connected with unlawful activity, the bare fact of membership does not justify charging members with their organization's misdeeds. A contrary rule would bite more deeply into associational freedom than is necessary to achieve state interests, thereby violating the First Amendment.

In previous discussions of the rights of students and teachers, it was noted that freedom of association and assembly are corollaries of free speech. By joining with others of like mind, people seek to amplify their voices and to increase their influence. The *McLaughlin* decision recognizes that insofar as they are expressive acts, forming and joining a union are constitutionally protected. Would not the same reasoning then apply to collective bargaining? After all, collective bargaining is a way for a group of people (employees) to speak as one.

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[12] 398 F.2d 287 (7th Cir. 1968); *see also*, American Fed. of State, County & Mun. Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969).

The courts that have considered the issue say that it does not: Collective bargaining is more than a form of expression for union members because it also compels the government (employer) to participate in the process. Unions and their members are free to exercise their constitutional rights to try to influence their employer, but there is no free speech or other constitutional provision that requires a government employer to engage in collective bargaining (or any other communication) with a union of its employees. Nor is there any federal statute giving public sector employees the right to bargain collectively. Thus, states may prohibit collective bargaining by public school teachers and in states where public sector collective bargaining is not required by statute, school boards are free to refuse to negotiate with unions.[13] Even in states where statutes do give teachers the right to bargain collectively, there is no constitutional right for individuals to select the union that will represent them.[14]

Freedom of speech does protect the right of teachers to promote unionization during nonclass time. As long as the effort to persuade other faculty members does not materially and substantially disrupt the school, one court said, school officials may not restrict it.[15] Another court said that teachers could not be precluded from using the school mail system and bulletin boards for the same purposes, but upheld school rules limiting the access to school grounds by union organizers who were not school employees to before and after school.[16] The court reasoned that school grounds were not a public forum, so school authorities could impose reasonable regulations on the use of the school's property.

The First Amendment also protects the right of employees publicly to criticize school officials regarding union issues that are a matter of public concern.[17] Picketing also enjoys an important degree of free speech protection;[18] however, courts are likely to allow prohibition of picketing when done with force, violence, or intimidation or for illegal purposes such as to promote an illegal strike.[19]

Public employees do not have a constitutional right to strike. Courts have denied claims that laws prohibiting teacher strikes are a form of involuntary servitude, violate the right of freedom of speech or assembly, or deny due process.[20] In rejecting the argument that prohibiting public school teacher strikes where private sector strikes are permitted violates equal protection, one court cited the crucial function that education plays in promoting the welfare of the state:

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[13] Winston-Salem/Forsyth County Unit of the N.C. Ass'n of Educators v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974).

[14] Indiana State Teachers Ass'n v. Board of Sch. Comm'r, 918 F. Supp. 266 (D. Ind. 1996), *aff'd*, 101 F.3d 1179 (7th Cir. 1996).

[15] Georgia Ass'n of Educators v. Gwinnett County Sch. Dist., 856 F.2d 142 (11th Cir. 1988).

[16] Texas State Teacher Ass'n v. Garland Indep. Sch. Dist., 777 F.2d 1046 (5th Cir. 1985).

[17] Hickman v. Valley Local Sch. Dist. Bd. of Educ., 619 F.2d 606 (6th Cir. 1980).

[18] Pittsburg Unified Sch. Dist. v. California Sch. Employees Ass'n, 213 Cal. Rptr. 34 (Ct. App. 1985).

[19] Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957); Board of Educ. of Martins Ferry City Sch. Dist. v. Ohio Educ. Ass'n, 235 N.E.2d 538 (Ohio Ct. Common Pleas 1967).

[20] City of New York v. DeLury, 243 N.E.2d 128, *remitter amended*, 244 N.E.2d 472 (N.Y. 1968); United Fed. of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (D.C. Cir. 1971).

> The state has a compelling interest that one of its most precious assets—its youth—have the opportunity to drink at the font of knowledge so that they may be nurtured and develop into the responsible citizens of tomorrow. No one has the right to turn off the fountain's spigot and keep it in a closed position. Likewise, the equal protection afforded by the fourteenth amendment does not guarantee perfect equality. There is a difference between a private employee and a public employee, such as a teacher who plays such an important part in enabling the state to discharge its constitutional responsibility. The need of preventing governmental paralysis justifies the "no strike" distinction we have drawn between the public employee and his counterpart who works for the private sector within our labor force.

State statutes vary with regard to the definition of a strike. Kansas defines a strike as any "action taken for the purpose of coercing a change in the terms and conditions of professional service or the rights, privileges or obligations thereof, through any failure by concerted action with others to report to duty including, but not limited to, any work stoppage, slowdown, or refusal to work." Where such broad and vague definitions apply, courts may consider organized refusals to perform extracurricular duties or work-to-rule actions as strikes.[21]

About half the states do not permit any organized work stoppages by teachers. In these states, a variety of penalties are possible against union and individual teachers who defy the law. These penalties include loss of pay, fines, and even dismissal of striking employees; fines and jail terms for union leaders who defy a court order to return to work; and union reimbursement of the board for substitute teachers, legal fees, and other expenses incurred in dealing with a strike.[22]

In states where statutes or common law give teachers the right to strike, the board may not retaliate against strikers, provided the strike is conducted according to law. Only about ten states grant teachers a full right to strike equal to that of private sector employees. In the remaining states that allow strikes, the board may still seek a court injunction ordering striking teachers back to work if the board can show that the strike creates a significant threat to public safety or is otherwise seriously detrimental to the public welfare.[23]

Statutes vary regarding the procedures to be followed in obtaining an injunction to end a strike, the penalties faced by striking employees, the extent to which these penalties are mandatory or subject to procedural rights or to modification by mitigating circumstances, the procedural rights of teachers before they may be dismissed or otherwise punished for illegal strike activity, the penalties that may or must be imposed upon the union itself such as fines or loss of the dues deductions or other privileges, and the authority of the courts to issue antistrike injunctions and to impose penalties for disobeying the court's order. The following case illustrates the enforcement of a state law permitting a qualified right to strike.

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[21] Board of Educ. of Asbury Park v. Asbury Park Ass'n, 368 A.2d 396 (N.J. Super. Ct. Ch. Div. 1976).

[22] Passaic Township Bd. of Educ. v. Passaic Teachers Ass'n, 536 A.2d 1276 (N.J. Super. Ct. App. Div. 1987); National Educ. Ass'n v. South Bend Community Sch. Corp., 655 N.E.2d 516 (Ind. App. 1995).

[23] Jersey Shore Area Sch. Dist. v. Jersey Shore Educ. Ass'n, 548 A.2d 1202 (Pa. 1988).

ARMSTRONG EDUCATION ASSOCIATION, v. ARMSTRONG SCHOOL DISTRICT

Commonwealth Court of Pennsylvania, 1972
291 A.2d 120

Blatt, Judge.

This is an appeal from an Order of the Court of Common Pleas of Armstrong County enjoining the appellant, the Armstrong Education Association ("Association"), from continuing to engage in a strike against the appellee, the Armstrong School District ("District"). The District has approximately 12,000 students, and it employs approximately 550 teachers, for whom the Association is the certified bargaining agent. Since December, 1970, the District and the Association have been engaged in negotiations in an effort to arrive at a collective bargaining agreement for the 1971–1972 school year.

In their negotiations, the parties followed the procedures outlined in the Public Employee Relations Act, Act of July 23, 1970, P.L., No. 195, 43 P.S. § 1101.101, et seq. (hereinafter "Act No. 195"), but they reached an impasse. In an effort to resolve this impasse, Association members began a strike against the District on April 27, 1971, and, in response to a complaint in equity filed on behalf of the District, the Court of Common Pleas of Armstrong County enjoined the strike on May 11, 1971, and ordered the teachers back to work. The teachers obeyed this Order and returned to work, finishing out the school year of 1970–1971.

Although negotiations continued, no agreement was reached and the teachers went out on strike again on August 30, 1971, just as the 1971–1972 school year was about to begin. Another complaint in equity was filed on behalf of the District, contending that the strike created "a clear and present danger or threat to the health, safety or welfare of the public," thus bringing the matter within the provisions of Section 1003 of Act No. 195, 43 P.S. § 1101.1003, and making it ripe for injunctive relief. Hearings were held by the Court of Common Pleas on September 1 and September 14, 1971, and the testimony at these hearings was substantially as follows:

The District Superintendent testified that the District was required to supply 180 instructional days prior to June 30, 1972 or be in danger of losing state subsidies, and that, with the school year scheduled to end on June 2, 1972, there might not be enough days remaining before June 30 to make up the time lost because of the strike.

The Assistant Superintendent testified that the strike had caused the cancellation of all extracurricular activities and varsity sports, and that, if permitted to continue, it would interfere with arrangements for "inservice days," which the District considered valuable for the teachers.

The testimony of the District Supervisor of Child Services was to the effect that a continuation of the strike would cause difficulties in obtaining qualified school bus drivers, and would bring about other problems concerning pupil transportation.

The Superintendent of Public Affairs testified that the strike had caused an interruption in his routine office procedures and that the negotiations had consumed so much of his time that a considerable backlog in his work was resulting.

The President of the School Board testified to several instances in which she and other Directors had been harassed by picketing and other disturbances at their homes and by the receipt of numerous unpleasant phone calls. She also testified as to the disorderly atmosphere in which a recent School Board meeting had been conducted, and as to the need for sheriffs deputies to be called in to keep order at the meeting. She at no time stated, however, that the matters complained of had been caused by

Association members; in a few instances, she specifically denied that any teachers had been involved.

Following the September 1 hearing, the Court denied the request for an injunction on the ground that it was premature, but, following the September 14 hearing, the Court issued the requested injunction, finding that a clear and present danger or threat to the health, safety or welfare of the public existed. Such a finding was based on the strained atmosphere in the community as evidenced by the harassment of School Board Directors and of the Judge, and on the fact that 12 days of school, which would have to be made up, had already been lost. The teachers were ordered back to work as of September 15, 1971. It is from this injunction that the Association has appealed. . . .

It was long the law in almost all jurisdictions that strikes by public employees were illegal, and Pennsylvania was no exception to this rule. The last decade, however, has brought a tremendous increase in the unionization of public employees and a corresponding increase in illegal strikes by these employees, who claim to have found their remedies under the law inadequate. The leaders in this new militancy, perhaps with good reason, have often been school teachers.

In order to deal with the problem of public employee labor relations, the legislature in 1970 enacted Act No. 195. This Act explicitly recognized the right of public employees to organize and to bargain collectively, and it also established specific procedures for collective bargaining which were intended to lessen the possibility of the development of an impasse. The Act provided, however, that if all the procedures have been complied with, and yet an impasse has developed, the right of the employees to strike must be recognized. The public employer is then given the right to seek equitable relief, including injunctions, in the court of common pleas of the jurisdiction where the strike occurs. Section 1003 of Act No. 195 provides, however, that an injunction may not issue unless ". . . the court finds that the strike creates a clear and present danger or threat to the health, safety or welfare of the public."

The determination of what is a "clear and present" danger under Act No. 195 presents some problems. The phrase has almost invariably been used heretofore in cases involving government interference with First Amendment rights.

A definition of the term, however, which seems to be applicable here was stated in *Communist Party of the United States v. Subversive Activities Control Board*, 223 F.2d 531 (D.C. Cir. 1954), as follows:

> The "clear" in that epigram is not limited to a threat indubitably etched in every microscopic detail. It includes that which is not speculative but real, not imagined but actual. The "present" in the epigram is not restricted to the climatically imminent. It includes that which exists as contrasted with that which does not yet exist and that which has ceased to exist.

In this light, the determination of whether or not a strike presents a clear and present danger to the health, safety or welfare of the public must, therefore, require the court to find that the danger or threat is real or actual and that a strong likelihood exists that it will occur. Additionally, it seems to us that the "danger" or "threat" concerned must not be one which is normally incident to a strike by public employees. By enacting Act No. 195 which authorizes such strikes, the legislature may be understood to have indicated its willingness to accept certain inconveniences, for such are inevitable, but it obviously intended to draw the line at those which pose a danger to the public health, safety or welfare.

The reasons indicated by the court for granting the injunction here fall generally into three categories: a) the disruption of routine procedures; b) the harassment of School Board Directors; and c) the danger of losing state subsidies because of the inability of the District to provide the full schedule of 180 instructional days.

The disruption and the harassment were certainly "clear and present" but they did not constitute a "danger" or "threat" as envisaged by Act No. 195. On the other hand, the loss of school subsidies was a "danger," but it was not, at least not yet, "clear and present."

The disruption of routine administrative procedures, the cancellation of extracurricular activities and sports and other such difficulties are most certainly inconvenient for the public, and especially for students and their parents. But these problems are inherent in the very nature of any strike by school teachers. If we were to say that such inconveniences, which necessarily accompany any strike by school teachers from its very inception, are proper grounds for enjoining such a strike, we would in fact be nullifying the right to strike granted to school teachers by the legislature in Act No. 195.

A more serious problem is raised by the community unrest and the harassment of public officials which have apparently occurred in reaction to the strike. The testimony gives no indication as to who has been involved in these incidents, although it was made clear as to some situations that the Association's members were *not* so involved. We deplore such activities and sympathize with the lower court's wish to bring them to an end. Enjoining the strike, however, was not a proper method of accomplishing this purpose. In this situation it does not seem to be the strike which was the "danger" to the public, but the reaction to it by persons unknown. We cannot find that Section 1003 of Act No. 195 was intended to permit striking employees to be penalized by having their strike enjoined because a number of citizens oppose their stand and choose to show this by disrupting the community. There are other laws available to deal with such disorders.

The danger that the District will lose state subsidies because of a strike would be proper grounds for enjoining the strike if such danger were "clear and present." And, although it is not certain that subsidies will in fact have to be withheld because of the strike, it is a possibility which cannot be ignored. If the strike lasted so long, therefore, that any continuation would make it unlikely that enough days would be available to make up the 180 required, the teachers could be properly enjoined from continuing it. At the time of the last hearing, however, the strike had lasted only 12 days, and the District had 20 days available in June plus 19 holiday dates which could be used to make up time lost. The possibility that the strike would extend longer than the make-up time available did not yet exist. If a strike is to be enjoined on the basis that insufficient make-up time actually will exist the strike must at the very least have reached the point where its continuation would make it either clearly impossible or extremely difficult for the District to make up enough instructional days to meet the subsidy requirement within the time available. This strike was far from that point when the Court below enjoined it. The fact that students and teachers might have to remain in school later in June than originally planned may be unfortunate, of course, but again it is merely an inconvenience inherent in the right of school teachers to strike, a right now guaranteed them by the law.

We must hold that at the time this injunction was issued, there were no reasonable grounds on which the lower court could find that the strike by the Association was a "clear and present danger or threat to the health, safety or welfare of the public." This is not to say, of course, that public employees may strike with impunity and ignore the public interest, nor that such inconveniences as those noted herein as incidental to a strike might not conceivably accumulate to such an extent, be continued so long or be aggravated by some unexpected development, so that the public health, safety and welfare would in fact then be endangered. We must hold, however, that the proper purpose of an injunction under Act No. 195 is to avert present danger, not to prevent danger which may never occur at all or which can only occur, if it does occur, at some future time before which the grievances concerned can reasonably be expected to be settled.

For the reasons stated, the order of the lower court is reversed and the injunction is hereby dissolved.

◆

A majority of state courts have held that a hearing prior to dismissal of illegally striking teachers is not constitutionally required.[24] These courts generally view illegally striking teachers as having abandoned their contracts, thus giving up any property rights to their jobs and any claims to procedural due process. A prompt hearing following dismissal to consider cases in which a teacher claims not to have been on strike is required.

11.3 RIGHTS OF NONUNION MEMBERS

Is it permissible to deny participation in the collective bargaining process to teachers who decline to join the union? May nonunion teachers be forced to pay union dues or fees? May schools adopt rules that make it easier for the officially designated union than for rival unions or individuals to communicate with teachers? The central issue in these questions is how to protect the rights of nonunion members without damaging the effectiveness of the collective bargaining process or violating the rights of union members.

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[24] Sanford v. Rockefeller, 324 N.E.2d 113 (N.Y. 1974), *appeal dismissed*, 421 U.S. 973 (1975); Farrelly v. Timberlane Reg'l Sch. Dist., 324 A.2d 723 (N.H. 1974).

Two Supreme Court cases have considered the issue of whether and under what circumstances a school board may give a teacher union and its members more opportunity to speak to the board than is granted to nonunion members. In *Madison Joint School District v. Wisconsin Employment Commission*,[25] a school board was accused of an unfair labor practice for allowing a nonunion teacher to speak at a public meeting in which the board was considering its position regarding an issue being negotiated with the union. The president of the union was also permitted to speak and to present a petition signed by union members. The Supreme Court ruled that it would have been impermissible to deny the nonunion teacher the right to speak:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated—an issue we need not consider at this time—the participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.

Minnesota State Board for Community Colleges v. Knight[26] concerned a Minnesota statute requiring public employers to engage in "meet-and-confer" sessions with their professional employees to exchange views on policy issues outside the scope of collective bargaining. The statute further specified that if an agency's professional employees were unionized, only representatives of the union could participate in the meet-and-confer sessions with the agency administration. Nonunion teachers argued that permitting unionized teachers to express their views to supervisors while denying nonunion members the right to express theirs in the same forum was a violation of their right of free speech.

In considering this claim, the Supreme Court was careful to distinguish the *Knight* case from *Madison*. Whereas the school board meeting in *Madison* was a traditional forum for the expression of public views, the meet-and-confer sessions in *Knight* were not. "It is a fundamental principle of First Amendment doctrine that for government property to be a public forum, it must by long tradition or by government designation be open to the public at large for assembly and speech." No one, explained the Court, has a constitutional right to speak in a nonpublic forum, even people directly affected by the issues under consideration. To hold otherwise would require revision of the procedures of every government body from Congress to school boards. Minnesota's law did not restrict employees from speaking or from joining with others of like mind. It simply restricted access to the formal meet-and-confer sessions to the duly elected representatives of the majority of an agency's professional employees. This, concluded the Court, was neither unconstitutional or unreasonable.

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[25] 429 U.S. 167 (1976).
[26] 465 U.S. 271 (1984).

The issue under consideration by the school board in the *Madison* case was whether to force nonunion members to pay a service or "agency-shop" fee to the union. Some states do not permit mandatory agency-shop fees while others do. The Supreme Court has considered constitutional issues relating to agency-shop fees in four cases. The first of the cases dealt with the right of teachers not to be compelled to support the political activities of the union.

ABOOD v. DETROIT BOARD OF EDUCATION

Supreme Court of the United States, 1977
431 U.S. 209

Mr. Justice Stewart delivered the opinion of the Court.

The State of Michigan has enacted legislation authorizing a system for union representation of local governmental employees. A union and a local government employer are specifically permitted to agree to an "agency shop" arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues. The issue before us is whether this arrangement violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees.

I.

After a secret ballot election, the Detroit Federation of Teachers (Union) was certified in 1967 pursuant to Michigan law as the exclusive representative of teachers employed by the Detroit Board of Education (Board). The Union and the Board thereafter concluded a collective-bargaining agreement effective from July 1, 1969, to July 1, 1971. Among the agreement's provisions was an "agency shop" clause, requiring every teacher who had not become a Union member within 60 days of hire (or within 60 days of January 26, 1970, the effective date of the clause) to pay the Union a service charge equal to the regular dues required of Union members. A teacher who failed to meet this obligation was subject to discharge. Nothing in the agreement, however, required any teacher to join the Union, espouse the cause of unionism, or participate in any other way in Union affairs.

On November 7, 1969—more than two months before the agency-shop clause was to become effective—Christine Warczak and a number of other named teachers filed a class action in a state court, naming as defendants the Board, the Union, and several Union officials. Their complaint, as amended, alleged that they were unwilling or had refused to pay dues—and that they opposed collective bargaining in the public sector. The amended complaint further alleged that the Union "carries on various social activities for the benefit of its members which are not available to nonmembers as a matter of right," and that the Union is engaged in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts with Defendant Board, and that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs, and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board.

The complaint prayed that the agency-shop clause be declared invalid under state law and also under the United States Constitution as a deprivation of the plaintiffs' freedom of association protected by the First and Fourteenth Amendments, and for such further relief as might be deemed appropriate. . . .

II.

A.

Consideration of the question whether an agency-shop provision in a collective-bargaining agreement covering governmental employees is, as such, constitutionally valid must begin with two cases in this Court that on their face go far toward resolving the issue. The cases are *Railway Employes' Dept. v. Hanson* and *Machinists v. Street.*

In the *Hanson* case a group of railroad employees brought an action in a Nebraska court to enjoin enforcement of a union-shop agreement. The challenged clause was authorized, and indeed shielded from any attempt by a State to prohibit it, by the Railway Labor Act, 45 U.S.C. § 152. The trial court granted the relief requested. The Nebraska Supreme Court upheld the injunction on the ground that employees who disagreed with the objectives promoted by union expenditures were deprived of the freedom of association protected by the First Amendment. This Court agreed that "justiciable questions under the First and Fifth Amendments were presented," but reversed the judgment of the Nebraska Supreme Court on the merits. Acknowledging that "[m]uch might be said *pro* and *con*" about the union shop as a policy matter, the Court noted that it is Congress that is charged with identifying "[t]he ingredients of industrial peace and stabilized labor-management relations. . . ." Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one.

The record in *Hanson* contained no evidence that union dues were used to force ideological conformity or otherwise to impair the free expression of employees, and the Court noted that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." But the Court squarely held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendmen[t]."

The Court faced a similar question several years later in the *Street* case, which also involved a challenge to the constitutionality of a union shop authorized by the Railway Labor Act. In *Street*, however, the record contained findings that the union treasury to which all employees were required to contribute had been used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed."

The Court recognized that these findings presented constitutional "questions of the utmost gravity" not decided in *Hanson*, and therefore considered whether the Act could fairly be construed to avoid these constitutional issues. The Court concluded that the Act could be so construed, since only expenditures related to the union's functions in negotiating and administering the collective-bargaining agreement and adjusting grievances and disputes fell within "the reasons . . . accepted by Congress why authority to make union-shop agreements was justified." The Court ruled, therefore, that the use of compulsory union dues for political purposes violated the Act itself. . . .

The holding in *Hanson*, as elaborated in *Street*, reflects familiar doctrines in the federal labor laws. The principle of exclusive union representation, which underlies the National Labor Relations Act as well as the Railway Labor Act, is a central element in the congressional structuring of industrial relations. The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . . , union and nonunion," within the relevant unit. A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." . . .

B.

. . . The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law. The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. The desirability of labor peace is no less important in the public sector, nor is the risk of "free riders" any smaller.

Our province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment. Rather, it is to adjudicate the constitutionality of that decision. The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.

While recognizing the apparent precedential weight of the *Hanson* and *Street* cases, the appellants advance two reasons why those decisions should not control decision of the present case. First, the appellants note that it is *government employment* that is involved here, thus directly implicating constitutional guarantees, in contrast to the private employment that was the subject of the *Hanson* and *Street* decisions. Second, the appellants say that in the public sector collective bargaining itself is inherently "political," and that to require them to give financial support to it is to require the "ideological conformity" that the Court expressly found absent in the *Hanson* case. We find neither argument persuasive.

Because it is employment by the State that is here involved, the appellants suggest that this case is governed by a long line of decisions holding that public employment cannot be conditioned upon the surrender of First Amendment rights. But, while the actions of public employers surely constitute "state action," the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*. The plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation. The appellants' reliance on the "unconstitutional conditions" doctrine is therefore misplaced.

The appellants' second argument is that in any event collective bargaining in the public sector is inherently "political" and thus requires a different result under the First and Fourteenth Amendments. This contention rests upon the important and often-noted differences in the nature of collective bargaining in the public and private sectors. . . .

[D]ecisionmaking by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters—taxpayers, users of particular government services, and government employees. Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. Whether these representatives accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service. It is surely arguable, however, that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector.

The distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model. . . . [A]lthough Michigan has not adopted the federal model of labor relations in every respect, it has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. As already stated, there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act. The only remaining constitutional inquiry evoked by the appellants' argument, therefore, is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not.

Public employees are not basically different from private employees; on the whole, they have the same sort of skills, the same needs, and seek the same advantages. "The uniqueness of public employment is *not in the employees* nor in the work performed; the uniqueness is in the special character of the employer." The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees. A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint. Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing. With some exceptions not pertinent here, public employees are free to participate in the full range of political activities open to other citizens . . .

There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees. It is no doubt true that a central purpose of the First Amendment "was to protect the free discussion of governmental affairs." But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights. Even those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned with its policy implications agree that "[t]he union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector. . . . No special dimension results from the fact that a union represents public rather than private employees." We conclude that the Michigan Court of Appeals was correct in viewing this Court's decisions in *Hanson* and *Street* as controlling in the present case insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes.

C.

Because the Michigan Court of Appeals ruled that state law "sanctions the use of nonunion members' fees for purposes other than collective bargaining," and because the complaints allege that such expenditures were made, this case presents constitutional issues not decided in *Hanson* or *Street*. Indeed *Street* embraced an interpretation of the Railway Labor Act precisely to avoid facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining. Since the state court's construction of the Michigan statute is authoritative, however, we must confront those issues in this case.

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

One of the principles underlying the Court's decision in *Buckley v. Valeo*, 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals," the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests."

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State . . .

These principles prohibit a State from compelling any individual to affirm his belief in God or to associate with a political party as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited . . .

III.

The Court of Appeals thus erred in holding that the plaintiffs are entitled to no relief if they can prove the allegations contained in their complaints, and in depriving them of an opportunity to establish their right to appropriate relief. . . .

The judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

[Rehnquist, Stevens, and Powell, joined by Burger and Blackman, filed concurring opinions.]

* * *

In three subsequent cases, the Court elaborated on the principles announced in *Abood*. In *Ellis v. Railway Clerks*,[27] the Court invalidated, as a violation of a federal statute, a rebate scheme that "allowed the union to collect the full amount of a protesting employee's dues, use part of the dues for objectionable purposes, and only pay the rebate a year later." The Court said that given the availability of alternative arrangements, such as the reduction of dues in advance or the use of interest-bearing escrow accounts, "the union cannot be allowed to commit dissenter's funds to improper uses even temporarily." The Court also held in *Ellis* that the union could not charge dissenting employees for the costs of general organizing efforts and for costs of litigation not involving the negotiation of agreements or the settlement of grievances. However, the union could charge these employees their share for the union's quadrennial convention, union publications, and social activities. The Court drew a distinction among these charges using the following test: "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."

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[27] 466 U.S. 435 (1984).

In *Chicago Teachers Union, Local No. 1 v. Hudson*,[28] the Court unanimously ruled against another union dues rebate procedure. The procedure was unconstitutional for three reasons: First, it permitted temporary use of nonmember contributions for ideological purposes. Second, it did not provide dissenting employees enough information to gauge the propriety of the union's calculation of the mandatory service fee. Third, it did not provide for a reasonably prompt decision by an impartial decision maker for employees who disputed the amount of the service charge. The Court also required that an escrow account be set up for the amount of the charge reasonably in dispute pending resolution.

Most recently, in *Lehnert v. Ferris Faculty Association*,[29] the Court announced three guidelines for deciding what charges to nonunion members were permissible. To be included in an agency fee, an activity must be "germane" to collective bargaining, be justified by the need for labor peace or to avoid "free riders," and not significantly add to the burden on free speech already imposed by the agency shop agreement. Applying these guidelines, the Court concluded that employees could be charged a pro rata share of the local union's payments to the state and national affiliate of the local union including support of the parent union's general collective bargaining activities; a union publication concerning professional development, unemployment, job opportunities, award programs, and education generally; sending delegates to the state and national conventions of the parent union; and expenses incurred preparing for a strike that would have been illegal under state law.

The agency-shop arrangement may be coupled with an administrative device called "dues check-off." Under this arrangement the union and employer agree that union dues and nonmember service fees will be deducted by the employer from the employee's paycheck and forwarded to the union. This arrangement saves the union the time and expense of collecting dues and helps prevent employees from engaging in dues avoidance. State laws vary with regard to dues check-offs, with some states making it a mandatory subject of bargaining, some making it a permissive subject of negotiations, and others actually prohibiting the arrangement. The states are split on whether dues check-off can be granted exclusively to the incumbent union.

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[28] 475 U.S. 292 (1986).
[29] 500 U.S. 507 (1991).

Relying on the principles established in the Supreme Court decisions discussed above, the Ninth Circuit upheld a dues-deduction system under which the fee paid by nonunion members was placed in an independently managed interest-bearing escrow account. No later than October 15th nonmembers had to be informed how they could obtain a rebate of the portion of the fee that was not mandatory. Nonmembers who wanted rebates had to submit letters by November 15th. They could either accept the union's calculation of the amount of the rebate and receive it promptly or request an independent calculation by an arbitrator in which case the rebate would be paid by mid-February. The court found this scheme to be a reasonable way of preserving the constitutional rights of nonmembers without imposing an undue administrative burden on the union.[30]

In addition to agency shops and dues deduction, incumbent unions have sought other protections against the activities of rival unions. Some states permit the incumbent union to be given exclusive access to school facilities. The constitutionality of a union's exclusive access to teacher mailboxes and internal mail delivery system was addressed by the Supreme Court in *Perry Education Association v. Perry Local Educators' Association*.[31] The Court began its analysis by noting that the school's internal mail system was not a public forum. Rather, it was created and employed for specific purposes relating to the conduct of the school's business. "Implicit in the concept of the nonpublic forum," said the Court,

> is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose for which the forum at issue serves.

Furthermore, said the court, the differential access in this case was reasonable:

> The differential access provided PEA [the official union] and PLEA [the rival union] is reasonable because it is wholly consistent with the District's legitimate interest in preserving the property . . . for the use to which it is lawfully dedicated. Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the School District . . . Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools. The policy serves to prevent the District's schools from becoming a battlefield for inter-union squabbles.

Finally, the court noted that the school had made no attempt to prevent the rival union from communicating with teachers by other means, either in or out of school. Thus, the official union's exclusive access to the internal mail system was upheld.

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[30] Grunwal v. San Bernardion City United Sch. Dist., 994 F.2d 1370 (9th Cir. 1993).
[31] 460 U.S. 37 (1983).

11.4 RIGHTS AND DUTIES IN COLLECTIVE BARGAINING

The question of the scope of bargaining—which subjects must be negotiated—has implications for the balance of power between teachers and school board. In most states, possible subjects of negotiation are divided into three categories: First, mandatory subjects must be bargained over if either party wishes. Sometimes a state statute specifies a policy that must be used, for example to carry out a reduction in force (RIF), unless the union and school board agree to negotiate a different policy.[32] A refusal to negotiate over a mandatory subject of bargaining is a violation of the duty to negotiate in good faith and an improper or unfair labor practice. Second, permissive subjects may be bargained over if both parties agree. Refusal to bargain over a permissive subject is not a violation of the duty to negotiate in good faith. Third, illegal subjects may not be bargained over; the board must decide these issues unilaterally.

State laws regarding which issues are mandatory, permissive, and illegal subjects of negotiation vary significantly, so the law of each state should be consulted.[33] In general, issues relating to the terms and conditions of teachers' employment are mandatory subjects of negotiation. These include hours of employment, length of the work year, workload, extra duties, salary, sick leave and other fringe benefits, grievance procedures, and issues of teacher safety.[34]

Issues of educational policy and school management such as who shall be hired and fired (sometimes referred to as "managerial prerogatives") are generally illegal subjects of negotiation.[35] Other subjects ruled nonnegotiable by some courts include promotions, curriculum, length of school year, transfer and assignment, staff size, and academic freedom.[36] Also nonnegotiable are issues controlled by constitutional or statutory law such as which categories of employees are eligible for tenure.[37] A Wisconsin court ruled that a race-conscious lay-off provision was unconstitutional and thus an illegal subject of negotiation.[38]

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[32] Board of Educ. of Community Unit Sch. Dist. No. 201-U v. Crete-Monee Educ. Ass'n, 497 N.E.2d 1348 (Ill. 1986).

[33] Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242 (1978 & Supp.).

[34] Lorain City Sch. Dist. v. State Employment Relations Bd., 533 N.E.2d 264 (Ohio 1988); *In re* Local 195 v. State, 443 A.2d 187 (N.J. 1982).

[35] Board of Educ. of North Bergen v. North Bergen Fed. of Teachers, Local 1060, 357 A.2d 302 (N.J. Super. Ct. App. Div. 1976).

[36] Boston Teachers Union, Local 66 v. School Comm. of Boston, 434 N.E.2d 1258 (Mass. 1982); Unified Sch. Dist. No. 501 v. Kansas Dep't of Human Resources, 685 P.2d 874 (Kan. 1984).

[37] Spiewak v. Board of Educ. of Rutherford, 447 A.2d 140 (N.J. 1982).

[38] Milwaukee Bd. of Sch. Dir. v. Wisconsin Employment Relations Comm., 472 N.W.2d 553 (Wis. 1991).

The line between mandatory, permissive, and illegal subjects of negotiation is often not clearly drawn. For example, in some states class size is a mandatory subject of negotiations but in most it is permissive. Even in states where class size is not mandatory, the impact of class size on teacher workload may be.[39] Curriculum is another subject that is at most a permissive subject of negotiations, but the workload effects of the curriculum adopted by the board are a mandatory subject. In most states the criteria for the evaluation of teachers is nonnegotiable, but the procedures for evaluation are mandatory. An Iowa court ruled that not only the procedures of evaluation, but also the substantive criteria of evaluation are mandatory subjects of negotiation.[40] Conversely, a Connecticut court ruled that even the procedures of evaluation are not a mandatory subject of negotiations.[41]

Most states take the position that an initial decision to carry out a RIF is a nonnegotiable management prerogative, but that RIF procedures and the impact of RIF on staff are mandatory. An Illinois court, however, ruled that even the initial decision to lay off teachers was a mandatory subject of negotiations.[42] Conversely, a New Jersey court ruled that both the initial RIF decision and the impact of the decision were illegal subjects of negotiation.[43] Another New Jersey court ruled that the decision whether to hold school on recess days to make up for snow days was not a mandatory subject, but the impact of the decision was negotiable unless negotiations would significantly interfere with managerial prerogatives. The court said that only if the impact of the decision could be severed from the basic decision were negotiations over the impact mandatory.[44]

Some states' statutes seek to avoid confusion by specifying a list of subjects in each category. Whatever the level of specificity of the statutes, disputes over the negotiability of specific subjects may arise because many educational issues involve both teacher working conditions and questions of policy and school management. A further complication is that the statutory language defining the scope of bargaining must be reconciled with other state statutes such as those addressing the promotion and evaluation of teachers.[45]

Courts may be called upon to resolve disputes over the negotiability of specific subjects as in the following case.

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[39] Decatur Bd. of Educ. No. 61 v. Illinois Educ. Labor Relations Bd., 536 N.E.2d 743 (Ill. App. Ct. 1989); Beloit Educ. Ass'n v. Wisconsin Employment Relations Comm., 242 N.W.2d 231 (Wis. 1976).

[40] Aplington Community Sch. Dist. v. Iowa Pub. Employment Relations Bd., 392 N.W.2d 495 (Iowa 1986).

[41] Wethersfield Bd. of Educ. v. Connecticut State Bd. of Labor Relations, 519 A.2d 41 (Conn. 1986).

[42] Central City Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 557 N.E.2d 418 (Ill. App. Ct. 1990), *appeal granted*, 561 N.E.2d 687 (Ill. 1990); *modified*, 599 N.E.2d 892 (Ill. 1992).

[43] Maywood Bd. of Educ. v. Maywood Educ. Ass'n, 401 A.2d 711 (N.J. Super Ct. App. Div.), *appeal denied*, 405 A.2d 836 (N.J. 1979).

[44] Piscataway Township Educ. Ass'n v. Piscataway Township Bd. of Educ., 704 A.2d 981 (N.J. Super. Ct. App. Div. 1998), *cert. denied*, 718 A.2d 1214 (N.J. 1998).

[45] Bethlehem Township Bd. of Educ. v. Bethlehem Township Educ. Ass'n, 449 A.2d 1254 (N.J. 1982).

CHEE-CRAW TEACHERS ASSOCIATION v. UNIFIED SCHOOL DISTRICT NO. 247, CRAWFORD COUNTY

Supreme Court of Kansas, 1979
593 P.2d 406

McFarland, Justice.

This appeal involves a dispute between Chee-Craw Teachers Association (hereinafter referred to as Association) and Unified School District No. 247 (hereinafter referred to as Board), arising from their professional negotiations for the 1978–79 school year.

The Association is the professional employees' association duly authorized to collectively negotiate with the Board on behalf of the teachers of U.S.D. 247. On December 1, 1977, the Board and the Association, pursuant to K.S.A. 1978 Supp. 72-5423, exchanged notices of items to be negotiated for the 1978–79 school year. On January 20, 1978, the Board advised the Association that it considered nineteen of the proposals, in whole or in part, to be "non-negotiable" items. On March 8, 1978, the Association brought an action against the Board seeking a temporary injunction to require the Board to enter into good faith negotiations and, upon the merits, a permanent writ of mandamus. The Board responded with a motion to dismiss based on procedural irregularities. On March 20, 1978, the Association's application for a temporary injunction and the Board's motion to dismiss were heard. On the following day the trial court entered its memorandum decision denying the motion to dismiss, determining which proposals were or were not mandatorily negotiable, and temporarily enjoining the Board to negotiate in good faith those proposals the court had found to be mandatorily negotiable. . . .

We proceed now to the category of alleged error relating to the district court's determination as to whether particular proposals were or were not mandatorily negotiable. Before taking up the individual topics in dispute, we need to establish some rules for determination of the scope of mandatory negotiations.

In 1970 the legislature enacted the Collective Negotiations Law (K.S.A. 72–5413 *et seq.*). In K.S.A. 72-5413(g) the following definition appears:

> "Professional negotiation" means meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service.

In 1976 and 1977 the statute was amended, but the amendments did not alter the section above-cited.

In *National Education Association v. Board of Education*, 512 P.2d 426 (1973) (commonly referred to as *Shawnee Mission*), this court was confronted with the question of what topics were negotiable within the phrase "terms and conditions of professional service." Therein it was held certain specific topics were included within the phrase and the "impact test" was adopted. In *NEA Topeka, Inc. v. U.S.D. No. 501*, 592 P.2d 93 (1979), we held that when the 1977 legislature amended K.S.A. 72-5413 to define "terms and conditions of professional service" it simply made statutory law out of the judicial determination of the scope of professional negotiations set forth in *Shawnee Mission*, but deleted three items from the list in *Shawnee Mission* namely, probationary period, transfers, and teacher appraisal procedures.

It is interesting to note that in *Shawnee Mission* individual proposals were not set forth and only topics were designated. Apparently, this approach worked satisfactorily (based on the absence of litigation thereon) until the 1977 legislature made statutory law of the *Shawnee Mission* determination, as aforementioned, with the enactment of K.S.A. 1978 Supp. 75–5413 (1) as follows:

> Terms and conditions of professional service means salaries and wages, hours and amounts of work, vacation allowance, holiday, sick and other leave, number of holidays, retirement, insurance benefits, wearing apparel, pay for overtime, jury duty, grievance procedure, disciplinary procedure, resignations, termination of contracts, matters which have a greater direct impact on the wellbeing of the individual professional employee than on the operation of the school system in the school district or of the community junior college and such other matters as the parties mutually agree upon as properly related to professional service. Nothing in this act, or the act of which this section is amendatory, shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state. . . .

In order to effectuate the intent of the Collective Negotiations Law it is imperative to break the present bottleneck in collective negotiations. To accomplish this, wherever possible, potential areas of dispute as to whether an item is mandatorily negotiable must be eliminated. Expeditious judicial determination of any remaining areas of dispute must be accomplished. We therefore establish the following rules of law and procedure:

1. In actions involving disputes as to whether proposals are mandatorily negotiable, the district court shall determine the matter in the same manner provided by the impasse procedure in K.S.A. 1978 Supp. 72-5426, which provides for a summary hearing commenced within five days, etc.

2. The district court shall, in its determination, decide such negotiability questions as a matter of law. Ordinarily, evidence admitted should be only the proposals themselves, but the district judge may, in his discretion, permit such other evidence as will assist him in understanding the nature and effect of the proposal. The court will, of course, hear arguments of counsel and consider prior case law.

3. The district court shall, whenever possible, determine the matter on the "topic" basis rather than on the nuances of the actual individual proposal. For example, this court held in *NEA Topeka, Inc.*, 592 P.2d 93, that class size was not negotiable. "Class size" is a topic and any particular proposal to negotiate class size, regardless of its phraseology, is not mandatorily negotiable. As another example, "insurance benefits" is a topic statutorily made mandatorily negotiable and any particular proposal, regardless of its phraseology, is mandatorily negotiable unless excluded by the following portion of K.S.A. 1978 Supp. 72-5413(1):

> Nothing in this act, or the act of which this section is amendatory, shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state.

The district court shall not be bound by the caption given the proposal in determining the negotiability question. If a particular proposal covers more than one subject, the district court may divide the proposal. Further, the district court may, where appropriate, conclude that a proposal which literally comes within a statutorily negotiable item is not included within the item because it goes beyond what was intended by the legislature to be included with the item. An example of this would be a proposal to require the Board to pay all teachers' wages in a lump sum to the Association and the Association would pay the teachers. This is technically a "wages" item, but goes far beyond what is intended for the item.

4. In determining a proposal sought to be made mandatorily negotiable under the "impact test" portion of K.S.A. 1978 Supp. 72-5413(1), the district court should consider (1) the nature of the mandatorily negotiable items specifically included in the statute; (2) that these specifically enumerated items relate directly to terms and conditions of professional service; (3) the fact that each of the specifically enumerated items would be equally appropriate to negotiations for factory workers, maintenance people, etc.; (4) that for any proposal to be made mandatorily negotiable under this test it should have a similar relationship to terms and conditions of professional service; and (5) that any such item should be a logical extension of the enumerated items and not an unauthorized invasion into the Board's policymaking duties and obligations.

We turn now to the particular proposals before us wherein we will apply the foregoing rules. The trial court found each of the proposals to be mandatorily negotiable. For simplification, we will use the word "negotiable" for mandatorily negotiable, and "non-negotiable" for not mandatorily negotiable. Also, for simplification, "statutory item" refers to an item specifically listed in K.S.A. 1978 Supp. 72-5413(1).

1. Nondiscrimination—Non-negotiable. The item is not a statutory item. The area is covered by other statutes as well as other state and federal law.

2. Academic and personal freedom—Non-negotiable. This topic was one of the items rejected by this court in *Shawnee Mission*. The topic was not included in the statutory items. Also included in this topic from another proposal is freedom of expression and political activity.

3. Assignment and transfer—Non-negotiable. Transfer was an item held negotiable in *Shawnee Mission*, but it was deleted by the legislature in listing the statutory items. Assignment is closely related thereto and a part of the same topic.

4. Extracurricular compensation—Non-negotiable, unless the particular duty to be performed is expressly set forth in the individual teacher's primary contract. Otherwise, the topic is non-negotiable pursuant to K.S.A. 72-5412a (Supplemental Contracts).

5. Reduction in personnel and recall of personnel—Non-negotiable, as determined in *Parsons NEA v. U.S.D. No. 503*, 593 P.2d 414 (No. 50,127, this day decided).

6. Dismissal procedures—Non-negotiable. Due Process Procedure is set forth in K.S.A. 1978 Supp. 72-5413 *et seq.* K.S.A. 1978 Supp. 72-5413(1) prohibits mandatory negotiation of items to adjust or change matters fixed by statute.

7. Binding arbitration of grievances—Non-negotiable. K.S.A. 72-5424 authorizes the inclusion of binding arbitration of grievances into negotiated contracts, but the topic itself is not mandatorily negotiable. The statute grants authority for such a provision if it is mutually agreed to be a negotiable item.

8. Procedure for discipline of teachers—Negotiable. "Disciplinary procedure" is a statutory item.

9. Procedure for nonrenewal of contracts—Non-negotiable. This is not a statutory item and the topic is covered by K.S.A. 1978 Supp. 72-5411 and the Due Process Act (K.S.A. 1978 Supp. 72-5436 *et seq.*).

10. Pay for unused sick leave—Negotiable. Sick leave is a statutory item.

11. Insurance coverage following "lay off"—Negotiable. Insurance is a statutory item.

12. Workday (length of day, arrival and departure time, number of teaching periods, duty-free lunch period, and no custodial work)—Negotiable. Topic is included in statutory item, "hours and amounts of work."

13. Frequency of grade cards—Non-negotiable. This is not a statutory item and fails the impact test.

14. Residual rights for teachers' work copyrighted and sold by the school district—Non-negotiable. This is not a statutory item.

15. Sufficient funds for textbooks and supplies—Non-negotiable. This is not a statutory item and fails the impact test.

16. Association rights. In *NEA Topeka, Inc.*, 592 P.2d 93, this topic was determined to be negotiable as applied to payroll deductions for association dues, transaction of association business during the school day (as more fully set forth in the opinion), leave pool for association business, use of inter-school mail system, and copies of negotiated agreements. These were held negotiable as being essential to the right of collective negotiations. We specifically limit this topic to those enunciated in *NEA Topeka, Inc.* We hold the proposals herein, relating to inessential convenience benefits for association officers, such as a telephone for the president in the classroom, being first on the agenda at Board meetings, and requiring each principal, as well as the Board or its designee, to meet with association representatives at least once a month, are non-negotiable.

17. Sabbatical leave—Non-negotiable. There is a statutory item of "sick and other leave." We hold sabbatical leave is not the type of leave intended to be included therein. Under the maxim *noseitur a sociis* (it is known from its associates), the term "sick and other leave" should be read as having the same general qualities and characteristics as its fellow terms.

18. In service education—Negotiable. The term is defined in K.S.A. 1978 Supp. 72-1106(d). The proposal is to establish a committee to make recommendations to the board as to in-service education. Under the impact test, the item is negotiable.

19. Form of individual teacher contracts—Non-negotiable. To require negotiation would defeat the statutory exclusion of supplemental contracts (K.S.A. 72-5412a) from collective negotiations. The form of the individual contract is for the Board to determine. The content of the individual contract, whatever its form, must not be in conflict with the negotiated agreement or statutory law. . . .

The judgment is affirmed in part and reversed in part.

◆

State statutes impose a duty of fair representation on the union. One of the requirements of this duty is that the union not enter into a contract that discriminates against any of its members. A New York court explained the union's obligation as follows:

> The bargaining agent has the duty to serve the interests of all members of a unit without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . . The deliberate sacrifice of a particular employee as consideration for other objectives must be a concession the union cannot make.[46]

Thus, in another New York case, a court concluded that a union had breached its duty of fair representation when it failed to bargain vigorously on behalf of female coaches. In settling for an unfair salary for these union members because the burden of representing them became onerous, the union discriminated as surely as if it had proposed the inadequate salary.[47]

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[46] Union Free Sch. Dist. No. 6 Babylon v. New York State Div. of Human Rights, 349 N.Y.S.2d 757 (App. Div. 1973), *appeal dismissed*, 309 N.E.2d 137 (N.Y. 1974).

The duty to bargain in **good faith** is imposed by law on both the school and the teachers' union, but good faith is hard to define. Good-faith negotiating means making a sincere attempt to come to an agreement. It requires cooperating in the bargaining process by scheduling and attending mutually convenient meetings, listening to and considering proposals made by the other side, and trying to resolve differences in a way both sides can accept. Good faith does not, however, require compromise or even revising one's original position, although as a matter of tactics and for the sake of public relations, both sides virtually always move from their original positions. Good-faith bargaining also requires sticking to one's word by not later vetoing a contract previously offered to the other side. Behaviors that can lead to a finding of a violation of the duty to bargain in good faith include: repeated postponement of meetings, taking unilateral action regarding a mandatory or agreed upon subject of negotiation, refusal to schedule regular meetings, repeated backing away from agreements reached on specific items earlier in the negotiations process, unwillingness to supply arguments and information to support proposals, and employing a negotiator who lacks the authority actually to engage in bargaining.

In *Montgomery County Council of Supporting Services Employees, Inc. v. Board of Education*,[48] the court discussed the difficulty of determining whether one party is simply a hard bargainer or comes to the table with no subjective intent to reach an agreement:

> The requirement of good faith is a subjective measure which can be applied only in light of the totality of the circumstances. It is not required that the parties reach agreement; nor is it even necessary that concessions be made. . . . Somewhat paradoxically, perhaps, the cases suggest that a "desire to reach agreement" constitutes good faith bargaining, and conversely that a "desire not to reach an agreement" is bad faith; condemned is a "predetermined resolve not to budge from an initial position," and required is "a serious attempt to resolve differences and reach a common ground.". . .
>
> The difficulty . . . is trying to legislate a state of mind. The task in applying the good faith standard is to distinguish, upon the facts of each case, between a party genuinely participating in negotiations, listening to and evaluating proposals made by the other side and attempting to explain its own position, with willingness to persuade and be persuaded, and a party merely "going through the motions" with a "predetermined resolve not to budge from an initial position."

11.5 GRIEVANCE PROCEDURES

State statutes may specify administrative procedures for dealing with alleged violations of a collective bargaining agreement. Collective bargaining contracts themselves may also establish grievance procedures for resolving claims of contractual violations. In about twenty states the law permits submitting teacher contract disputes to a form of arbitration in which a neutral third party is empowered to make a decision that both sides must accept. Courts have affirmed the legality of grievance arbitration at least with regard to subjects within the scope of bargaining.[49]

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[47] United Teachers of Seaford v. New York State Human Rights Appeal Bd., 414 N.Y.S.2d 207 (App. Div.), *appeal granted*, 396 N.E.2d 207 (N.Y. 1979).

[48] 354 A.2d 781 (Md. 1976).

Usually the law requires exhausting all available grievance procedures before submitting a dispute to a court; however, there may be times when state law and the collective bargaining agreement give teachers two separate options for contesting what they believe to be a contractually impermissible action by their employer. For example, a dismissed teacher might seek review of the decision through the grievance mechanism of the contract or through the procedures spelled out in state law. Courts are in agreement that where these options exist, teachers may choose either of them.[50] Election of one procedure sometimes, but not always, has been held to bar the use of the other.[51] New York permits a teacher to pursue the grievance procedure and statutory procedure simultaneously even if this creates the possibility of inconsistent results.[52] Once a particular procedure has been pursued to its final step and a final decision rendered, the other procedure can no longer be used.[53]

Collective bargaining contracts often give the union the exclusive power to decide whether a grievance will be filed. Thus, a teacher whose union refuses to prosecute a grievance could not use this avenue of redress. In exercising the power to decide whether to prosecute a grievance, private sector unions are under federal statutory obligation to act fairly.[54] State courts have found a similar duty under state public sector bargaining laws as part of the union's duty of fair representation.[55] Similarly, when two members of the same union are in conflict regarding which one will be retained and which one let go, the union may not hire an attorney to defend only one of them.[56]

An issue that frequently arises in conjunction with the use of grievance procedures is whether the board has the authority to submit a particular issue to arbitration. For example, is it permissible for the board to agree to submit a teacher dismissal to arbitration or must the board reserve the ultimate decision to itself? The answers to these questions vary from state to state depending on statute.[57]

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[49] West Fargo Pub. Sch. Dist. No. 6 of Cass County v. West Fargo Educ. Ass'n, 259 N.W.2d 612 (N.D. 1977).

[50] Board of Educ. of Huntington v. Associated Teachers, 282 N.E.2d 109 (N.Y. 1972); Public Employees Relations Comm. v. District Sch. Bd. of DeSoto County, 374 So. 2d 1005 (Fla. Ct. App. 1979).

[51] Pedersen v. South Williamsport Area Sch. Dist., 677 F.2d 312 (3d Cir. 1982).

[52] *In re* Susquehanna Valley Teachers Ass'n, 429 N.Y.S.2d 741 (App. Div. 1980), *aff'd*, 420 N.E.2d 400 (N.Y. 1981); *but see*, Board of Educ. Cattaraugus Cent. Sch. v. Cattaraugus Teachers Ass'n, 447 N.Y.S.2d 51 (App. Div. 1981), *aff'd*, 434 N.E.2d 262 (N.Y. 1982).

[53] Board of Educ. of Huntington v. Associated Teachers, 282 N.E.2d 109 (N.Y. 1972).

[54] Vaca v. Sipes, 386 U.S. 171 (1967).

[55] Baker v. Board of Educ. of West Irondequoit, 514 N.E.2d 1109 (N.Y. 1987).

[56] Jacobs v. Board of Educ. of East Meadow, 405 N.Y.S.2d 159 (Sup. Ct. 1977), *rev'd*, 409 N.Y.S.2d 234 (App. Div. 1978).

Assuming the board has the authority to submit a particular issue to arbitration, a school board and teacher can still disagree on whether the contract requires submitting the issue to arbitration. In other words, disputes can arise concerning the scope of the negotiated arbitration agreement itself. State courts have taken divergent approaches to resolving these issues.[58]

State courts are also divided over the related issues of whether the arbitrator or the courts decide whether an issue is arbitrable. New York courts assert that they have the primary authority to interpret a contract's arbitration clause and that "it must be taken, in the absence of clear, unequivocal agreement to the contrary, that the board of education did not intend to refer differences which might arise to the arbitration forum."[59] Minnesota courts take a position somewhat more favorable to arbitration. In that state, if the arbitrability of a dispute is subject to "reasonable debate," the arbitrator must first make the determination of arbitrability. After arbitration, this decision may be appealed to the courts, which will consider the question of arbitrability independently.[60] Wisconsin's approach is the most favorable toward arbitration. The arbitrator must first decide arbitrability. On appeal, the court must defer to the arbitrator's decision "as long as it is within the bounds of the contract language, regardless of whether we might have reached a different result under that language, [provided the decision] does not violate the law."[61]

Once a grievance has been settled by arbitration most courts take the decision of the arbitrator as valid and binding and will not review or overturn the decision unless it is totally unreasonable[62] or violates state or federal law or policy such as by contradicting a legitimate school board decision concerning a nonnegotiable issue.[63] The remedy granted by the arbitrator to the winning party such as reinstatement or damages must conform to the contract and not violate state law.[64]

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[57] Acting Superintendent of Sch. of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n, 369 N.E.2d 746 (N.Y. 1977); School Comm. of Danvers v. Tyman, 360 N.E.2d 877 (Mass. 1977); Board of Educ. of Phila. v. Philadelphia Fed. of Teachers Local No. 3, 346 A.2d 35 (Pa. 1975).

[58] Wyandanch Union Free Sch. Dist. v. Wyandanch Teachers Ass'n, 397 N.E.2d 384 (N.Y. 1979); School Dist. of Erie v. Erie Educ. Ass'n, 447 A.2d 686 (Pa. Commw. Ct. 1982).

[59] Acting Superintendent of Sch. of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n, 369 N.E.2d 746 (N.Y. 1977).

[60] Minnesota Educ. Ass'n v. Independent Sch. Dist. No. 495, 290 N.W.2d 627 (Minn. 1980).

[61] Fortney v. School Dist. of West Salem, 321 N.W.2d 225 (Wis. 1982); *see also*, Scranton Fed. of Teachers, Local 1147 v. Scranton Sch. Dist., 444 A.2d 1144 (Pa. 1982); School Dist. of Erie v. Erie Educ. Ass'n, 447 A.2d 686 (Pa. Commw. Ct. 1982).

[62] Niagara Wheatfield Adm'r Ass'n v. Niagara Wheatfield Cent. Sch. Dist., 375 N.E.2d 37 (N.Y. 1978).

[63] Matter of Buffalo Council of Supervisors & Adm'r v. City of Buffalo Sch. Dist., 626 N.Y.S.2d 623 (App. Div. 1995).

[64] Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17, 666 P.2d 928 (Wash. App. Ct. 1983).

11.6 INDIVIDUAL TEACHER CONTRACTS

As seen in chapters 9 and 10, many aspects of the relationship between teachers and their employers are controlled by federal and state constitutional and statutory law. School boards and teachers—either collectively or individually—may not enter into contracts that contradict state law, for example by allowing teachers to make personnel decisions that the law reserves to school boards.[65] State law may even permit school boards to make decisions that have the effect of modifying the contract between the board and its teachers, for example, by revising the school calendar to make up for days missed because of weather. Teachers may be required to follow the modified calendar, even to attend school on days specifically designated by the contract as vacations.

As discussed earlier in this chapter, in school districts with collective bargaining, many of the terms of the employment of all of a school district's teachers are set by an agreement between a teacher union and school board. The collective bargaining agreement is a mandatory part of the contract of each individual teacher within a school district, so school boards and teachers may not enter into contracts that contradict the collective bargaining agreement even if both wish to do so. For example, where the collective bargaining agreement specifies a single salary schedule for all teachers, the school board may not agree to a higher than scheduled salary for a teacher it considers particularly valuable.

However, the collective bargaining agreement is not by itself specific enough to constitute an enforceable contract between the school board and any individual teacher. Teachers must still have individual contracts spelling out, among other things, the specific positions they are to hold, the hours they are to work, and the salary and benefits they are to receive. Teachers may also have separate or supplementary contracts regarding coaching or other extra-duty assignments. The collective bargaining agreement may be viewed as setting the framework of the agreement between a teacher and school board with the individual contract filling in the details.

In school districts without collective bargaining, each teacher is theoretically free to negotiate the entire contract from scratch. In practice, however, the board generally insists on fairly similar general terms for all its teachers with only variations similar to those in collective bargaining districts.

Whether an individual teacher's contract emanates from a collective bargaining agreement or not, an extensive and complex set of statutory and common laws regulates its formation and implementation. Employment contracts in education are usually bilateral, meaning that each party makes promises in advance to the other, and are express rather than implied, meaning that the promises are made in words rather than inferred from actions. Where permitted by law, teaching contracts or, more frequently, supplemental duty contracts may be oral. Oral contracts are difficult to enforce because it is hard to prove what was said. Even where there is no written contract, an employee is entitled to reasonable compensation for services performed at the request of and for the benefit of an employer.

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[65] *In re* Brighton Cent. Sch. Dist., 505 N.Y.S.2d 522 (Sup. Ct. 1986); Board of Educ. v. Round Valley Teachers Ass'n, 914 P.2d 193 (Cal. 1996); Oak Harbor Sch. Dist. v. Oak Harbor Educ. Ass'n, 545 P.2d 1197 (Wash. 1976).

The five essential elements of a binding employment contract in education are: (a) manifestation of mutual assent, (b) consideration, (c) competence of the parties, (d) legality of subject, and (e) satisfaction of statutory requirements for formation of a contract.

Manifestation of mutual assent is accomplished by the making of an offer and its acceptance. An offer is a specific proposal with definite terms communicated by one person to another that creates in the mind of a reasonable person the perception of an invitation to assent. An offer and acceptance lacking definite terms does not create an enforceable contract. Courts will not supply missing terms or provide definitions for vague terms like "good wages."[66]

A properly formulated and communicated offer confers on the person to whom the offer is made (offeree) a power of acceptance until the offer terminates. An offer can terminate by lapse of time, revocation, rejection, counteroffer, death or insanity of either party, destruction of the specific subject matter to which the offer relates, or subsequent illegality of the type of contract contemplated by the offer. Offers may contain specific dates by which the acceptance must be made. If there is no such express time limit, the offer is said to be open for a reasonable time or until revoked or otherwise terminated. Offers, rejections, and counteroffers are effective when received.

An acceptance of an offer is some overt act by the offeree, usually written or oral, that manifests intent to assent to the terms of the offer. The acceptance must be positive and may not change any of the terms of the offer, so counteroffers operate as a rejection of the original offer. In one case, a teacher who deleted from her contract the condition that she update her certificate was held not to have executed a contract.[67] In another case, a principal who added to the contract the stipulation that he be given rent-free housing was held to have made a counteroffer that did not create a contract.[68]

A late or defective acceptance does not create a contract; however, a late or defective acceptance does operate as a new offer that the original offeror may accept. Acceptances are generally effective when dispatched not just when received, unless the offer specifically provides otherwise or the offeree uses an unauthorized means of communication. An authorized means of communication is one that has been expressly authorized by the offeror or, if none is authorized, the means used by the offeror. Thus, if the offer came by mail, the offeree should use the mails, and the acceptance is effective the moment the offeree mails the properly stamped and addressed acceptance.

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[66] McCutcheon v. Chicago Principals Ass'n, 513 N.E.2d 55 (Ill. App. Ct. 1987); Ayer v. Board of Educ. of Cent. Sch. Dist. No. 1, 330 N.Y.S.2d 465 (Sup. Ct. 1972); Fairplay Sch. Township v. O'Neal, 26 N.E. 686 (Ind. 1891).

[67] Nelson v. Doland Bd. of Educ., 380 N.W.2d 665 (S.D. 1986).

[68] Morton v. Hampton Sch. Dist. No. 1, 700 S.W.2d 373 (Ark. Ct. App. 1985).

Mistakes arising from a failure to read a document are not a basis for avoiding contractual liability. With very few exceptions, parties are held to what they sign; however, no binding contract is formed if one party makes an offer containing a serious mistake (e.g., a misplaced decimal point in a proposed salary) and the other accepts knowing of the error or with good reason to suspect it.

Consideration is whatever is given in exchange for something else provided. Two requirements must be met: The parties must intentionally enter into a bargained exchange and the promises or performance of both parties must meet certain tests of legal sufficiency. The concept of a bargained exchange means that the parties negotiated and mutually agreed on what is to be exchanged. The tests of legal sufficiency are technical. What one party, either offeror or offeree, gives to the other must either be a **legal detriment** to that party or provide a **legal benefit** to the other party. Legal detriment means doing or promising to do something that the person making the promise was under no legal obligation to do or refraining or promising to refrain from doing something that could have been legally done. Legal benefit is obtaining from the other party something that one had no prior legal right to obtain.

These technical requirements are easily satisfied in employment contracts: The school board promises salaries and benefits, something it was not previously obligated to offer, and gets in return a promise of services, something the teacher was not previously obligated to provide. When the board gives remuneration, it suffers a legal detriment and the teacher gets a legal benefit. Likewise, the teacher providing services suffers a legal detriment and the board gets a legal benefit.

Both parties to the contract must be of legal age and mentally competent to undertake the terms of the contract. This is not usually an issue in education employment contracts.

No employment contract may commit the board to undertake an act that is illegal or contrary to public policy. For example, the board and Mr. Jones could not strike a deal under which Jones stays on as principal of the high school in exchange for the board contracting with Jones's son for a school renovation.

Education employment contracts must also satisfy a variety of **state statutory requirements**. Most states' laws specify that only the board, acting as a corporate body at a properly convened meeting, can contractually bind the district. The board may not delegate its power to make contracts to its administrators or other employees, and contracts not formally approved by the board may not be enforced.[69] Nor are contracts enforceable if they exceed the board's statutory authority. Most states also require that school district employment contracts be in writing. In some states the failure to issue a notice of nonrenewal automatically constitutes an offer of employment for the subsequent year.[70]

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[69] Big Sandy Sch. Dist. No. 100-J v. Carroll, 433 P.2d 325 (Colo. 1967); Board of Educ. of D.C. v. Wilson, 290 A.2d 400 (D.C. 1972).

[70] Enstad v. North Cent. of Barnes Pub. Sch. Dist. No. 65, 268 N.W.2d 126 (N.D. 1978).

Occasionally, the issue arises whether a contract has been formed even though some aspect of the statutory requirements has not been satisfied. Courts insist that major requirements such as school board approval be satisfied, but contracts are sometimes upheld even if minor technical requirements are not met.[71] In any event, improperly processed contracts can be ratified by the board after the fact, thereby rectifying the earlier error.

The duties and obligations of a contract may be **discharged**, thus terminating the agreement in several ways. Exact performance of the contractual duties discharges both parties from further obligation. A breach of the contract by one party that is material and goes to the essence of the contract discharges the other party's duties. A breach that is not material still gives rise to a cause of action for breach of contract and provides an excuse for nonperformance by the aggrieved party. A nonmaterial breach does not, however, discharge the aggrieved parties from further duties under the contract. Interference by one party that prevents performance by the other constitutes a material breach that discharges the contract. Repudiation in advance by one party of the contract is treated as a breach, and the nonrepudiating party may bring suit as if it were a breach. Mutual agreement by the parties rescinds the contract. Agreement to substitute a new performance for the duty originally owed under the contract terminates the original agreement. Performance is discharged when a subsequent change in the law makes the contract illegal. The death or debilitating illness of an employee under contract to perform personal services discharges the contractual duties. In this situation, known as **impossibility of performance**, an employer's duties are also discharged, and the person may be let go. Impossibility also encompasses **impracticality**, meaning that the contract could be fulfilled only with extreme and unreasonable difficulty, expense, injury, or loss. Thus, in one case, a teacher could be dismissed when his deteriorating eyesight led him to seek extended sick leave and his diminished ability to read made it increasingly hard to meet normal teaching duties.[72] However, federal and state law prohibiting discrimination against the disabled should be taken into account before dismissals are undertaken in such situations (see sec. 9.6).

Contracts may include **conditions** or **contingencies**. A contractual condition is any event the happening or nonhappening of which affects the duties in the contract. There may be conditions that must be satisfied before any duty to perform exists. For example, approval of the contract by the school board is necessary to the creation of contractual duties. Other conditions terminate any duties to perform. For example, a teacher's job might be subject to the condition that the federal government renew the grant funding the position.[73]

When one party fails to live up to the terms of the contract, the disappointed party can sue for **breach of contract**. The law seeks to provide a remedy that places the injured party in the same position as if the contract had been fulfilled. Sometimes this only requires a court to issue an order prohibiting continued violation of a contractual term or requiring specific execution of a provision of the contract such as the procedures governing teacher dismissal. Most often the remedy for breach of contract is the awarding of monetary damages to compensate the aggrieved party for what would have been gained had the breach not occurred and for expenses incurred because of the breach. Employees who fail to complete the term of their contracts might have to compensate their employers for expenses incurred in obtaining a replacement. Aggrieved employees may be awarded salary and any other expenses incurred as a result of an employer's breach, such as the cost of seeking and moving to a new job.[74]

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[71] School Bd. of Leon County v. Goodson, 335 So. 2d 308 (Fla. Dist. Ct. App. 1976); Lynch v. Webb City Sch. Dist. No. 92, 418 S.W.2d 608 (Mo. Ct. App. 1967).

[72] Oneal v. Colton Consol. Sch. Dist. No. 306, 557 P.2d 11 (Wash. Ct. App. 1976); Fisher v. Church of St. Mary, 497 P.2d 882 (Wyo. 1972).

[73] Parliment v. Yukon Flats Sch. Dist., 760 P.2d 513 (Alaska 1988).

In fairness to the defaulting party, the law says the injured party cannot recover damages that could have been avoided through the exercise of reasonable diligence and without incurring undue risk, expense, or humiliation. Thus, the injured party is expected to take reasonable steps to **mitigate damages** by, for example, seeking another job; however, the injured party does not have to take a job inferior to the one lost. In one case, a principal dismissed in violation of his contract was not required to accept a job as a teacher that paid as much as the principalship.[75]

In some employment contracts the parties agree that an employee who breaches the contract will pay a specified amount of money in lieu of damages assessed in the usual way. These **liquidated damage** clauses are enforceable when it is difficult for the contracting parties to determine the exact monetary value of the contract breach, provided the amount is reasonable and not punitive.[76]

Unless there is a statute to the contrary, the law permits teachers to work without a contract, but when there is no contract the issue may arise regarding the salary owed to the teachers. When a statute is available to govern the noncontract situation, its terms control the level of payment owed, but when there is no statute, courts resolve such questions in a manner designed "to assure a just and equitable result."[77] In one case, the court ruled that teachers who did agree to a new contract would be paid retroactively under the new salary schedule, whereas teachers who did not agree were to be paid under the terms of the previous year's salary schedule, including the experience increment due to them under that schedule.[78]

As the following case illustrates, disputes sometimes occur over the issue of whether a contract has been formed between a teacher and a school board.[79]

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[74] McBeth v. Board of Educ. of DeValls Bluff Sch. Dist. No. 1, 300 F. Supp. 1270 (E.D. Ark. 1969).

[75] Williams v. Albemarle City Bd. of Educ., 508 F.2d 1242 (4th Cir. 1974).

[76] Bowbells Pub. Sch. Dist. No. 14 v. Walker, 231 N.W.2d 173 (N.D. 1975).

[77] Bradkin v. Leverton, 257 N.E.2d 643 (N.Y. 1970).

[78] Davis v. Board of Educ. of Aurora Pub. Sch. Dist. No. 131, 312 N.E.2d 335 (Ill. App. Ct. 1974).

[79] *See also*, Knipmeyer v. Diocese of Alexandria, 492 So. 2d 550 (La. Ct. App. 1986); Board of Educ. of D.C. v. Wilson, 290 A.2d 400 (D.C. 1972); D'Ulisse-Cupo v. Board of Dir. of Notre Dame High Sch., 520 A.2d 217 (Conn. 1987).

BOTTINEAU PUBLIC SCHOOL DISTRICT NO. 1 v. CURRIE

Supreme Court of North Dakota, 1977
259 N.W.2d 650

Pederson, Justice.

Celia Jo Currie, a teacher, appeals from a district court judgment which held that she breached her 1975–1976 contract with the Bottineau School and, accordingly, must pay $500 to the school board as liquidated damages. We reverse the judgment.

Currie fulfilled her obligation as a teacher for the 1975–1976 school term under a contract which required her to teach girls' physical education, coach girls' basketball, assist in coaching girls' track, and perform such other duties as were assigned by the administration. As a part thereof, her contract adopted board policies, which provided, in part:

> 9. Because it is impracticable or extremely difficult to fix the actual cost to be incurred at the time of the release request, the parties, hereto, agree that the amount presumed to be the cost of replacement shall be fixed as follows:

Time of Release Request	Cost of Replacement:
Within the first 3 days after contract due date	$100
Between 3 days after the contract due date prior to end of present school term	$250
Between end of present school term to the termination date of this contract	$500

> Nothing stated herein shall be construed as meaning that the Board must release the teacher upon payment of the above determined costs. The fee may be waived by the Board if the teacher's resignation is due to ill health, military service, or a hardship case.

Neither the contract nor the policy identify either the "contract due date," "termination date," or "present school term," as those terms are used in the board policy. The contract was executed on June 4, 1975, and states that it covers a period of nine months beginning August 29, 1975. Presumably, then, the contract was fulfilled on or about May 29, 1976.

A communication dated April 14, 1976, was received by Currie from the clerk of the school board, which stated:

> The law provides that on or before April 15 the School Board must notify you of its intention to renew your contract for next year.
>
> Because negotiations are still in progress as to the terms of 1976–77 contracts, the Board has decided that it is not in a position to make a final offer at this time, and therefore will simply refrain from giving notice, thus creating the automatic statutory offer to renew on the same basis as last year's contract, with the understanding that if negotiations shall result in an agreement either more or less favorable to you, when such an agreement has been reached by both negotiating parties, the Board will offer you a contract in accordance with such an agreement.
>
> However, in order for the Board to arrange for replacements of those of you who do not wish to remain with us next year, we ask that you kindly notify the Board at the earliest possible date.
>
> As provided by law, failure on your part to notify us of your acceptance of contract for next year on or before May 14, 1976, will constitute a rejection of the offer.

Accompanying the above communication was a copy of § 15–47–27, NDCC, with the following provision underlined:

> On or before April fifteenth in any year and not earlier than February fifteenth, all teachers shall be notified of a date, which shall not be less than thirty days after the date of such notice, upon which they will be required to accept or reject proffered re-employment, and failure on the part of the teacher to accept said offer within such time shall be deemed to be a rejection of the offer.

Also included was a blank form response as follows:

> This is to notify you of my intention:
>
> (Check one)
> ___ to accept the proffer of employment by the Bottineau Public School Board.
> ___ to reject the proffer of employment by the Bottineau Public School Board.

I understand this offer is based on "the same terms and conditions as the . . . current year (1975–76)."

Acceptance of this offer does not eliminate

(1) the obligation of the School Board to execute a contract reflecting the terms and conditions of a new settlement if that settlement occurs . . . or . . . **(2)** the right of the teacher to resign from this position without stipulated damages through May 15, 1976.

(Signed)

(Date)

(Please return on or before May 14, 1976)

Currie did not return the above form response but utilized a form dated April 5, 1976, prepared by the teachers. That response was not addressed to the school board or its clerk, but to the school superintendent. The form stated as follows:

Subject: Letter of intent
As an employee of the Bottineau school system
___ it is my intent
___ it is not my intent
to return to the Bottineau Public Schools for the 1976–77 school year. . . .

Currie checked the blank "x it is my intent," and added at the end of the form, in handwriting: "provided I do not get the job I was interviewed for at the junior college. I will know definitely May 20, 1976." She then signed her name and delivered the document to the superintendent on May 14, 1976. This action by Currie amounted to a counter offer, to which the school board never responded.

On either June 3 or 4, Currie, having learned that she would not receive the junior college position, went to the superintendent's office and indicated to him that she would return to the Bottineau school. The exact language she used is somewhat disputed. The superintendent testified that she said, "Well I guess I will be back with you another year, I did not get the college job." Currie says that she was a little upset about not getting the college position, and "so I remember trying to be kind of lighthearted about the situation. I said something to the effect that they would be stuck with me, or have to put up with me for another year."

Sometime after June 4, while Currie was attending summer school at NDSU, the superintendent telephoned her and offered her the position of head track coach. The superintendent said that he had no prior approval from the school board to make this offer but that it was standard practice for the superintendent to hire and the school board to confirm. The superintendent testified that Currie said that "she would like to have the position and she would accept it." Currie testified that her response was: "I was interested . . . I never said I accept." At a school board meeting on July 13, 1976, there was a recommendation to "move Miss Currie to head Girls Track." The minutes reflect no action taken on the recommendation, however the superintendent testified that "it was moved and carried, seconded and carried unanimously, she be given the position."

The only conflicting testimony in this case concerned the exact words spoken at the June 3 or 4 meeting between Currie and the superintendent in his office, and during their subsequent telephone conversation about the head track coaching position. The trial judge made no specific finding from which we can determine whether he considered one witness more believable than the other.

Having previously discussed with him a job possibility at Minot State College, Currie made the following statement in a letter dated July 29 and received July 31 by the superintendent:

This letter is to inform you of my intention to resign my teaching and coaching position at Bottineau effective this date.

I have enjoyed my four years at Bottineau, but the position at Minot State College is the advancement for which I have been waiting.

The letter was read at the school board's August 2 meeting, after which there was a motion made, seconded and carried that ". . . we accept Miss Currie's resignation but the stipulated damage clause would apply." Currie was notified of the school board action in a letter dated August 3 from the superintendent, which stated:

It is the feeling of the Board that if the continuing contract law and your letter of intent are binding upon the School Board, that they should also be binding upon the teacher and therefore the stipulated damages clause would be in effect. As this is a late resignation, the cost of replacement is stipulated at $500.00 in accordance with Article 9 of the Bottineau School Board Policy as amended June 3, 1975.

We are not told in the record, or otherwise, whether the June 3 amendment to the school board policy, referred to in the superintendent's letter, related to any matter at issue in this case, so we presume that it did not. Currie's reply of August 21 stated: "Since I had not signed a contract for the 1976–77 school year at the Bottineau Public Schools, I do not believe the stipulated damages clause pertains in my situation." This letter was read at a school board meeting of August 23. The minutes of that meeting state: "The Board felt, if a letter of intent was binding on a School Board, it was just as binding for a teacher." A motion "to respond" was made, seconded and carried. In a letter dated August 24, the superintendent responded to Currie by stating, in part: ". . . it is still their feeling that the continuing contract law in the State of North Dakota is binding upon both the teacher and the School Board and therefore the stipulated damages clause is appropriate and it is their intent to follow up on this matter."

The record discloses that negotiations for 1976–1977 contract terms were in process between the school board and the Bottineau Teachers Association and that those negotiations resulted in an agreement on August 5, 1976, covering the 1976–1977 school term. We are not informed as to any of the terms agreed upon.

Currie continued to refuse to pay the stipulated damages and suit was brought. After a trial to the court without a jury, the court found as a fact that Currie intended to accept a job under the continuing contract provisions of § 15–47–27, NDCC, and that Currie caused damages to the school board, pursuant to the stipulated damages clause of the continuing contract. The court made a conclusion of law that the 1975–1976 contract, including the liquidated damages clause, was binding on both parties pursuant to the continuing contract provisions of § 15–47–27, NDCC. . . .

Whether a contract with the same terms as the 1975–1976 contract was, in this case, created under the provisions of § 15–47–27, NDCC, and whether Currie's expression of intent to accept the offer by the school board created a binding contract with the same terms as the 1975–1976 contract are questions of law. . . .

The letter of notice sent by the clerk of the school board to Currie, and the other professionally certified staff members, does purport to advise that, by simply refraining from giving notice, the board was "creating the automatic statutory offer to renew on the same basis as last year's contract," with the understanding that if negotiations resulted in agreement, a contract would be offered by the board in accordance with such agreement. It further expresses a very valid and understandable purpose in noting that, in order to arrange for replacements, there was need to know at the earliest possible date which teachers did not wish to return the next year.

The letter is patently ambiguous. The school board asks that we apply only one aspect of the letter and thus ignore those aspects which make it ambiguous. This we cannot do. Section 9–07–19, NDCC, which directs that ambiguous public contracts be interpreted against a private party, cannot be applied to offers to contract. When there is a mutual assent as to the terms of an offer and an acceptance, a contract exists.

We next look to the supposed acceptance by Currie. Her response stated that it was her intent to return. Only an expression of intent was requested. In *Hayashi v Ihringer*, 58 N.W.2d 788, 791 (1953), this Court said:

> A mere statement of an intention to act in a certain way is not a promise upon which a contract can be predicated.
>
> Care should be taken not to attach promissory and contractual effect to what was at the time merely an expression of intention concerning future action.

Although contracts may be "implied," as well as "express," because of the ambiguity as to what was offered and the expression of only an intent to accept, we do not find that a contractual obligation was created, either directly or by implication, which can be enforced in an action at law or equity.

The ambiguity of the documents which were given to Currie and the responses from her lead to serious questions as to what contract terms would have resulted. We hold that, on the facts presented in this case, no contract was made. We are not unmindful that this decision, in finding a letter of intent not binding upon a teacher, may bring into question the effect of documents heretofore considered to be a very important part of the contracting process between school boards and teachers. The courts do not draft the documents but must try to give effect to those drafted by the parties. . . .

We reverse the judgment and, on remand, direct entry of a judgment of dismissal. Because the case involves a matter of public concern, neither party will be allowed costs.

* * *

As *Bottineau* shows, contracts are not formed by statements of intention to hire or to work in the absence of a definite agreement between the parties on terms of the employment. Even where there is a definite agreement, a contract may not be formed if one of the parties lacks the authority to enter into a contract. Thus, a teacher's acceptance of a public school principal's offer of employment would not create a contract because only school boards have the statutory authority to enter into contracts with teachers.[80] Employment contracts may also fail to be formed when a teacher does not return an acceptance by the stated deadline[81] or if the acceptance is not delivered by the required mode (e.g., if a school district's written offer required a written acceptance but the acceptance was oral[82]).

In a Florida case, a teacher told her principal that she was inclined to apply for an additional year of leave; however, before she filed any leave forms, but after the principal had hired a replacement, the teacher told the principal she had changed her mind. The court ruled that the teacher had not relinquished her position.[83] In another case, a faculty member signed the annual letter setting the salary and wrote the words "under protest" on the letter.[84] The court ruled that his signing was a valid acceptance and not a counteroffer that terminated the original offer. Therefore, an enforceable contract had been formed.

Several cases have considered the issue of whether a teacher with coaching or other paid supplemental duties is working under one contract or two. These cases usually involve teachers who wish to resign from coaching but continue to teach or school boards that wish to fire a coach with tenure as a teacher. Some state statutes require that supplemental duty agreements be separate from the basic teacher contract even if they are written on a single document.[85] However, where no such statute exists, as in the following case, the divisibility of a contract depends primarily on the intentions of the parties. One court ruled that a teacher who had a three year contract to teach and coach had the right to continue to teach and to be paid the full agreed-upon salary for the entire period even if the school district no longer wished him to coach.[86]

Questions sometimes arise over whether a teacher's contract may include more than what is written on the document both parties signed. Specifically, cases have addressed the question of whether school rules, a teachers' handbook, or a school publication is part of the contract. The courts have said that such materials may be part of the contract if their terms are sufficiently specific, the employee is aware of them, and the materials are part of the bargained exchange.[87] Courts in several states, however, have ruled that if there is evidence that the employer reserved the right to unilaterally change the handbook, then it is not considered part of the contract.[88] Also, if the handbook specifically contains a statement that it does not constitute a contract, then the courts will not enforce it.[89]

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[80] Brown v. Caldwell Sch. Dist. No. 132, 898 P.2d 43 (Idaho 1995).

[81] Niedbalski v. Board of Educ. of Sch. Dist. No. 24 of Platte Ctr., 418 N.W.2d 565 (Neb. 1988); Corcoran v. Lyle Sch. Dist. No. 406, 581 P.2d 185 (Wash. Ct. App. 1978); *but compare*, California Teachers Ass'n v. Governing Bd. of Mariposa County Unified Sch. Dist., 139 Cal. Rptr. 155 (Ct. App. 1977).

[82] *See*, Foster v. Ohio State Univ., 534 N.E.2d 1220 (Ohio App. 1987).

[83] Gainey v. School Bd. of Liberty Country, 387 So. 2d 1023 (Fla. Dist. Ct. App. 1980).

[84] Price v. Oklahoma College of Osteopathic Medicine & Surgery, 733 P.2d 1357 (Okla. App. Ct. 1986).

[85] Swager v. Board of Educ., Unified Sch. Dist. No. 412, 688 P.2d 270 (Kan. Ct. App. 1984).

[86] George v. School Dist. No. 8R of Umatilla County, 490 P.2d 1009 (Or. 1971).

Courts are in general agreement that state law is part of the contract.[90] The power of legislatures to change law and thus change the terms of the contract may be implied by the contract or an express provision of it. Some states permit school boards to unilaterally change employment contracts under exigent circumstances. In 1991, in response to a severe budget crisis, the City of Baltimore decided to pay its teachers approximately one percent less than the salary specified in their contracts. The teachers sued the city, claiming that the unilateral contract modification violated Article 1, Section 10 (the Contract Clause) of the Constitution. The Contract Clause prohibits states from passing any law "impairing the obligation of contracts." In rejecting the claim, the Fourth Circuit noted that the Contract Clause is not an absolute bar to modification of a state's own financial obligations. Unilateral contract modifications must be "reasonable and necessary to serve an important public purpose." The salary reduction was permissible because Baltimore had made concerted but unsuccessful efforts to find alternative solutions, the reduction was no greater than necessary, and the plan was abandoned at the first opportunity.[91]

Sometimes the parties to a contract have expressed themselves in both a specific document and other oral or written statements, known as **parol evidence**. When this happens, there are several possibilities: There are two separate contracts, the basic written document and the other statements comprise one contract, or the written document constitutes the entire and only contract, unaffected by the other statements. The general rule is that when the basic written contract is an **integrated agreement**, the parol evidence will not be permitted to modify it in any way. A written contract is an integrated agreement when the parties so intended. To manifest this intention, many contracts contain a clause affirming that the contract constitutes the entire agreement between the parties.[92]

Even when the parties know what words constitute their contract, they may disagree on their meaning. Carefully worded contracts are less likely to engender these disputes. When disagreements do arise, the courts may be asked to interpret the contract. Although there is no procedure that guarantees discovery of the true meaning of a contract, certain rules of interpretation serve as guidelines. Contracts are interpreted in accordance with the purpose and intentions of the parties insofar as these are ascertainable. Ordinary words are given their usual meaning and technical words their technical meaning. Separately negotiated terms are given greater weight than standardized terms and specific terms greater weight than general terms. Interpretations that make the contract and all its provisions reasonable, lawful, meaningful, and consistent are preferred.

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[87] Law v. Mandan Pub. Sch. Dist., 411 N.W.2d 375 (N.D. 1987); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

[88] Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Jackson v. Action for Boston Community Dev., Inc., 525 N.E.2d 411 (Mass. 1988); Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988).

[89] Castiglione v. Johns Hopkins Hosp., 517 A.2d 786 (Md. Ct. Spec. App. 1986).

[90] Haverland v. Tempe Elementary Sch. Dist. No. 3, 595 P.2d 1032 (Ariz. Ct. App. 1979); Bump v. Union High Sch. Dist. No. 3, 24 P.2d 330 (Or. 1933).

[91] Baltimore Teachers Union v. Mayor of Baltimore, 6 F.3d 1012 (4th Cir. 1993).

[92] *Cf.*, Chandler v. Lamar County Bd. of Educ., 528 So. 2d 309 (Ala. 1988).

11.7 SUMMARY

Within the boundaries of federal and state law, the terms and conditions of a teacher's employment are set down in a contract. In most school districts, the contract is developed through a process of collective negotiations between a union representing all the district's teachers and the school board. Teachers have a constitutional right to join a union, but collective bargaining is at the discretion of the legislature and courts of each state. Most states do allow some form of collective bargaining for teachers.

The process for selecting the union, the terms of the relationship between the union and its members and between the union and the school board, and the duties and obligations of both sides in collective bargaining are established by state law. The union is required to fairly represent all teachers within the district, even those who choose not to join. Both sides are obliged to bargain in good faith, that is, with an intention of reaching a mutually satisfactory agreement, over issues specified or implied by state law as mandatory subjects of negotiation. Generally these issues relate to teacher well-being and working conditions. Certain other issues may be bargained at the discretion of both sides. Collective bargaining agreements often include an agreement to submit certain employment disputes to arbitration by a neutral third party.

In addition to the collective bargaining agreement, each teacher has an individual contract detailing the specific terms of employment. To be enforceable, a teacher's contract must meet certain conditions. The most important of these is that both parties must come to an understanding of the duties and obligations that each will assume. Even so, legal disputes sometimes arise concerning the meaning and interpretation of a contractual provision. The more clear and detailed the contractual language, the less likely that these disputes will arise.

CHAPTER 12

TORTS

A student throws a pencil striking another in the eye. A visitor trips in a pothole on the school grounds and injures his knee. An intruder forces a student into a school closet and rapes her. A student severs his finger on a saw in shop class. Another student sneaks out of school during school hours and is injured by a speeding motorist. A teacher sues the school because her supervisor's evaluation described her lesson plans as unprofessional. Cases like these are the province of the body of law known as torts.

Unlike criminal law, which deals with wrongs against society in general, torts deals with harm inflicted by one party on another whether by intentional wrongdoing, recklessness, or simple carelessness. Whereas the primary purpose of criminal law is to punish the wrongdoer, tort law seeks to provide restitution to the injured party. Tort law provides a way to sue for compensation for wrongful harm to, among others, one's body, property, or reputation. The usual remedy is monetary damages, although courts may also issue an injunction to prohibit the continuation of a harmful activity.

A typical tort suit involves one private individual suing an individual, a corporate body, an agent of the government, or the government itself for harm done either intentionally or negligently. Children may be plaintiffs in lawsuits against their schools and school districts or against individual educators. Children may also be defendants in tort suits, although, in practice, it may be difficult to prove the elements of a tort case against a young child, particularly a tort that requires a showing of intentional wrongdoing, such as battery. It also may be difficult to collect damages from children, many of whom have few assets of their own. As a result, individuals injured or damaged as a result of a tort committed by a student at school often seek to hold the school liable (e.g., for failing to adequately supervise the child).

Whereas schools and their employees once enjoyed protection from tort suits under principles of government and government officer immunity, these immunities have been severely curtailed or eliminated in most states. As a result, tort suits may be brought against individual educators as well as the school board or district itself, and, occasionally, individual school board members. Individual teachers and principals may be held personally responsible for their tortious acts. Principals may also be held liable for failing to properly train or supervise a teacher who commits a tort as a result of the principal's failure. School boards and districts may be held liable regarding such matters as the failure to provide a sufficient number of teachers to supervise school activities or for the faulty maintenance of the school's buildings and grounds. School districts may also be held "vicariously" liable for the tortious acts of their employees or anyone else authorized to act on behalf of the district (see sec. 12.5).

Because of the variety of activities schools undertake and the immature and active nature of their clientele, school boards and personnel are particularly vulnerable to certain kinds of tort suits. Yet school districts of similar size, programs, and demographics often vary greatly with regard to the number of suits filed against them, suggesting that a high rate of tort litigation is not inevitable. With attention to legal principles and care, the risk of incurring a tort suit can be greatly reduced. This chapter presents an overview of the law relating to the types of torts that are most common in schools. A principal goal of the chapter is to provide an understanding of the principles of tort law sufficient to form the basis of a program of preventive law.

12.1 INTENTIONAL TORTS: BATTERY, ASSAULT, FALSE IMPRISONMENT, AND INTENTIONAL INFLICTION OF MENTAL DISTRESS

Intentional means that a person desires to bring about the consequences of an act or believes that the consequences are almost certain to result from it. If X, believing he is alone on the desert, fires a gun, and the bullet strikes and injures Y, X intended to fire the gun but not to injure Y. If, however, X throws a bomb into Y's office with intent to injure him, knowing that Z is also there and will almost certainly be injured too, then X intended the injury not only to Y but also to Z. X's intent to injure Y applies to Z as well. Motive is distinguished from intent. Motives are the reasons for bringing about the consequences of an act. Minors are liable for their intentional acts; however, a minor's age, knowledge, and intelligence are important in determining if the minor was capable of forming an intent to harm.

Battery is the intentional, unwanted, and offensive or harmful touching of another person's body with the intent to cause the other to suffer the contact. Battery can involve direct bodily contact such as a punch or the use of an object such as a stick. A contact is viewed as offensive if it would be offensive to a hypothetical reasonable person. However, consent to some bodily contact is assumed in normal situations where contact is inevitable, such as a crowded elevator.

Battery is distinct from **assault**. An assault is an action that has the intent to place another in reasonable apprehension of imminent bodily harm or offensive contact. The apprehension must be one that would be aroused in the mind of a reasonable person. Words accompanying an action can add to the apprehension. Whereas battery protects bodily integrity, assault protects peace of mind. Thus, in assault, the person in danger of immediate bodily contact must have knowledge of the danger. An assault typically precedes a battery, but, even if no battery occurs, the assault is still actionable. Both battery and assault may be crimes as well as torts and can lead to both a civil lawsuit and a separate criminal prosecution.

False imprisonment is the intentional confining of a person within a fixed space. The person must be conscious of the confinement or harmed by it. The restraint can be accomplished by physical barriers, threats of force, false assertion of legal authority, or indirect methods such as confiscating a purse to prevent the departure of the owner. The tort of false imprisonment protects people's interest in freedom from restraint. Although rare in school contexts, false imprisonment claims may be brought in cases of the unjustified confinement of a student.

The tort of **intentional infliction of mental distress** permits people who have been subjected to extreme and outrageous conduct to sue for damage done to their peace of mind. Discomfort arising out of ordinary everyday insults, indignities, profanity, or even threats is not actionable, and only distress that a reasonable person of ordinary sensibilities would feel in the circumstances may be compensated. In one case, a coach played a trick on a kindergarten student by telling the student that the coach had hanged two of the student's friends. The coach showed the student one of the friends lying on the floor pretending to be dead. When the student began to cry, the coach admitted the joke. Subsequently, the student, previously a well-adjusted five-year-old, began to experience psychological difficulties: he refused to go to the bathroom alone and to wipe himself, he was afraid the coach was going to jump out of the mirror at him, he would not sleep in his own room, and he became overly dependent on his mother. The student won an award of $100,000 and his parents won an additional $10,000 for **loss of consortium**, damage to the relationship between parent and child.[1] Besides cruel pranks such as this, repeated, severe verbal abuse (including racial and sexual harassment, see sec. 6.8) or improper drug tests, searches, or physical examinations may result in claims of infliction of emotional distress against educators and schools.

THE DEFENSE OF PRIVILEGE

A defendant is not liable for an intentional tort if the defendant's act was privileged. Tort law recognizes that certain actions are socially so important that the defendant is protected from liability despite injury to the plaintiff. The privileges most often relevant in education cases are the authority of certain adults to discipline children, consent, self-defense, and defense of others. Although the plaintiff carries the burden of persuading the court that a tort has occurred, the defendant has the burden of establishing the existence of one of the privileges.

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[1] Spears v. Jefferson Parish Sch. Bd., 646 So. 2d 1104 (La. Ct. App. 1994).

The **privilege of discipline** allows parents and teachers to use reasonable force including corporal punishment for the discipline and control of children. For example, school officials may seize pupils who refuse lawful orders and physically compel them to move.[2] However, there are limits to what constitutes reasonable force, and tort suits charging school personnel with assault and battery are not uncommon. Whether the force used on a child was reasonable is determined in light of the age, sex, physical and mental condition of the child, the nature of the child's wrongdoing, the reasons for the child's actions, the influence of the child's example on other children, whether the force was necessary to compel the child's obedience, whether the force was proportionate to the child's offense, and the harm inflicted. Findings of abuse of the privilege of discipline are most common if the child suffers permanent or long-term harm, especially physical injury, or if the teacher acts out of ill-will or malice. The courts have also found liability when the force was unnecessarily degrading as in the case of a teacher who used a cattle prod to discipline his pupils.[3]

In states where corporal punishment is illegal by statute (see chap. 5), educators may still use reasonable force to control students but not in retribution for wrongdoing. Even in states where corporal punishment is legal, its use is generally limited to statutorily specified purposes and must be reasonable under the circumstances. For example, a Texas court found that under that state's law, corporal punishment may only be used when "necessary (1) to enforce compliance with a proper command issued for the purpose of controlling, training or educating the child, or (2) to punish the child for prohibited conduct; and, in either case, the force or physical conduct must be reasonable and not disproportionate to the activity or offense." Based on this principle, the court found that a football coach was not privileged to use "physical violence against a child" for purposes of "instruction and encouragement." Such use of violence, concluded the court, might constitute assault, even though the coach had no intent to injure the child.[4]

Consent by the plaintiff to the tortious conduct of the defendant generally precludes the liability of the defendant. Consent may be expressed explicitly or implied from the plaintiff's conduct. The defendant can show that the plaintiff consented by presenting evidence demonstrating that a reasonable person would have understood the plaintiff as consenting. The privilege extends only to the specific conduct to which the plaintiff consented, not related acts. The consent is not effective if not given voluntarily or if the plaintiff lacked capacity to consent. There is no specific age when a minor acquires the capacity to consent, so the issue must be evaluated on a case-by-case basis. In general, the more serious the invasion of a minor's interest, the less likely that the minor has the capacity to consent. The defense of assumption of risk, closely related to consent, is discussed in sec. 12.4.

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[2] People ex rel. Hogan v. Newton, 56 N.Y.S.2d 779 (City Ct. of White Plains 1945).

[3] Rolando v. School Dir. of Dist. No. 125, County of LaSalle, 358 N.E.2d 945 (Ill. App. Ct. 1976).

[4] Hogenson v. Williams, 542 S.W.2d 456 (Tex. App. 1976); *see also*, Tinkham v. Kole, 110 N.W.2d 258 (Iowa 1961).

The privilege of **self-defense** and the privilege of **defense of others** allow the use of reasonable force to defend oneself or someone else against unprivileged battery or other bodily harm that one reasonably believes is about to be intentionally inflicted by another. In some cases, a person may reasonably believe there is danger, even if no danger actually exists. The past conduct, reputation, words, and gestures of the plaintiff can be taken into account in determining if an apprehension of danger was reasonable. The question is whether, for example, a reasonable teacher would have believed that a pupil was about to intentionally inflict harm. If so, the privilege of self-defense or defense of others applies, but the act of defense must be proportionate to the threat. In one case, a teacher successfully claimed self-defense when he pulled a gun from the glove compartment of his car and brandished it at a student who had been chasing him with a thirty-inch two-by-four.[5]

A majority of the states allow a person to stand and fight when threatened even if flight is possible. The privilege of self-defense ends when the assailant has been disarmed or defeated, withdraws, or gives up. Revenge and retaliation are not self-defense.[6] Students are not privileged to use force to resist teachers physically enforcing lawful orders. For example, if a teacher orders a student to leave the classroom, the student refuses, and the teacher forcibly escorts the student from the class, the student is not privileged to use self-defense against the teacher. One may use self-defense only against unprivileged uses of force.[7]

12.2 DEFAMATION AND EMPLOYEE LETTERS OF REFERENCE

When people spread gossip about teachers or students, write reference letters or performance reviews, publish articles in the school newspaper or yearbook, make comments about school administrators at public meetings, answer questions about someone else in the course of an investigation, or write statements about students for inclusion in their permanent file, the possibility of saying something defamatory arises. Defamation occurs when one person makes a false statement about another that causes damage to the person's reputation or standing within the community. Generally speaking, **libel** is written defamation and **slander** is spoken defamation, although this distinction has undergone some modification in recent years.

To support a legal finding of defamation, a certain specific set of conditions or elements must be present. The six elements of defamation are: false facts, harm, publication, clear reference, standard of fault, and no privilege. Although the law of defamation varies somewhat from state to state, the principles presented are applicable in most jurisdictions.

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[5] Landry v. Ascension Parish Sch. Bd., 415 So. 2d 473 (La. Ct. App. 1982).
[6] Thomas v. Bedford, 389 So. 2d 405 (La. Ct. App. 1980).
[7] *Cf.*, Andreozzi v. Rubano, 141 A.2d 639 (Conn. 1958).

The first element of defamation is that the defendant must have conveyed **false facts** about the plaintiff. There must be a significant misrepresentation or inaccuracy, something more than a minor error or technical untruth.[8] A statement by a principal that teacher X had missed class more than once a week for a year or by a teacher that students Y and Z had had sexual relations would satisfy this element if the alleged events had not occurred. False facts can be communicated by implication as in the case of a former employer who told a prospective employer he "couldn't go into" the reasons for a dismissal. The statement was made in a way that implied that the employee had been terminated for serious misconduct.[9]

Statements of pure opinion, such as "I don't like teacher Jones," cannot be the basis of a defamation suit because they do not state a fact that can be disproved. Subjective judgments based on true facts and conclusions from facts assumed to be generally known such as, "Jones is the worst teacher in the school," cannot be defamatory even if unreasonable or unfair.[10] Courts have viewed an accusation that a principal was a racist[11] and, in another case, a student's writing that a professor's in-class statements made her believe that the professor was homophobic[12] as opinion and therefore not defamatory. Also generally immune from defamation because they convey opinions rather than alleged facts are verbal abuse, hyperbole, and humor. Thus, in one case, the caption, "Not tonight Ms. Salek. I have a headache," under a teacher's photo in the "Funny Pages" of the school yearbook was ruled nonactionable.[13]

On the other hand, statements of **mixed opinions** may satisfy the first element of defamation. Mixed opinions are statements apparently based on facts not expressly stated nor assumed to exist; the statement thus implies that the speaker or writer possesses facts that justify the opinion. A statement such as, "In my opinion teacher Jones is an alcoholic," may be defamatory because it implies a set of facts that may be false. So may statements like, "I feel that teacher Jones does not turn the students on" and, "I believe that Jones is unwilling to go the extra mile," because they imply a lack of effort and success in teaching.[14]

Whether the burden of proof regarding the truth or falsity of an allegedly defamatory statement lies with the plaintiff or defendant varies with the type of case. The Supreme Court has ruled that when the statement involves a matter of public concern, the plaintiff must prove that it was false.[15] In cases involving nonmedia defendants, many states require the defendant to prove the truth of the statement; however, the law is changing on this point, with an increasing number of jurisdictions placing the burden on the plaintiff to prove falsity.

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[8] Masson v. New Yorker Magazine, Inc., 85 F.3d 1394 (9th Cir. 1996).

[9] Frank B. Hall & Co. v. Buck, 678 S.W.2d 612 (Tex. Ct. App. 1984).

[10] *See*, Moyer v. Amador Valley Joint Union High Sch. Dist., 275 Cal. Rptr. 494 (Ct. App. 1990).

[11] Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988).

[12] Lester v. Powers, 596 A.2d 65 (Me. 1991).

[13] Salek v. Passaic Collegiate Sch., 605 A.2d 276 (N.J. 1992).

[14] True v. Ladner, 513 A.2d 257 (Me. 1986).

[15] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

The second element of defamation is that the defendant's statement must have caused **harm** to the plaintiff's reputation or standing within the community. Another way of saying this is that the statement must have been defamatory. Some statements are considered defamatory **per se**, meaning that they are assumed to have caused harm. Accusations of criminal behavior, adultery, or that a person is suffering from a sexually transmitted disease are defamatory per se.[16] Courts are split on whether falsely stating that a person is homosexual is defamatory per se.[17] Statements that are not defamatory per se can still be defamatory **per quod** if the defendant can show that the statement caused actual harm. Accusations of intoxication at a public dinner, that a teacher let students "pet" in the hallways, and that a teacher stole books from the school were all found to be defamatory per quod.[18] Accusations by an employer or supervisor that an employee abused drugs or committed sexual harassment at work may be defamatory per quod.[19]

The third element of defamation is **publication**. The statement must have been intentionally communicated by the defendant to someone other than the plaintiff such as by sending a letter of reference to a prospective employer. In one case, dictation to a secretary of a dismissal letter counted as publication.[20] A person who repeats a statement has satisfied the element of publication even if the original source is cited; so has anyone assisting in communicating a statement to others such as the publisher of a book or a school that sponsors a student newspaper. However, if someone eavesdrops on a statement by the defendant to the plaintiff or someone copies and distributes a letter from the defendant to the plaintiff, the defendant is not liable.

Employers sometimes seek to avoid liability for defamation by orally informing only employees themselves of reasons for their dismissal and subsequently refusing to write anything other than the confirmation of dates of employment in letters of reference. Employees seeking new employment then may face the dilemma of having either to lie or to repeat false defamatory statements about themselves when asked what reasons their former employer gave for dismissing them. To deal with this situation the legal theory of **compelled self-publication** has recently emerged. The doctrine holds that when defamatory statements are made to a terminated employee, publication will be assumed because the employee will be forced to repeat the reasons for the dismissal when seeking reemployment.[21]

The fourth element of defamation, **clear reference**, means that it must be reasonably apparent that the statement was about the plaintiff. The plaintiff does not have to be specifically named in the statement; the reference can be by inference, even as part of an alleged work of fiction in which the plaintiff is recognizable as one of the characters. Statements regarding a group of people—for example, "All teachers in school X smoke pot"—can satisfy this element if plaintiffs can show that the statements referred to them as part of the group. Even a reference to "some" teachers in the building might satisfy this element for plaintiffs who prove that their reputations were damaged.[22]

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[16] *See*, Baskin v. Rogers, 493 S.E.2d 728 (Ga. App. 1997).

[17] *Per se*: Manale v. New Orleans, 673 F.2d 122 (5th Cir. 1982); Mazart v. State, 441 N.Y.S.2d 600 (Ct. Cl. 1981). *Contra*, Hayes v. Smith, 832 P.2d 1022 (Colo. Ct. App. 1992); Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. 1977).

[18] Ford v. Jeane, 106 So. 558 (La. 1925); Larive v. Willitt, 315 P.2d 732 (Cal. Ct. App. 1957); Angel v. Levittown Sch. Dist. No. 5, 567 N.Y.S.2d 490 (App. Div. 1991).

[19] Huston Belt & Terminal Ry. v. Wheery, 548 S.W.2d 743 (Tex. App. 1976), *appeal dismissed*, 434 U.S. 962 (1977); Gonzalez v. CNA Ins. Co., 717 F. Supp. 1087 (E.D. Pa. 1989).

[20] Frankson v. Design Space Int'l, 380 N.W.2d 560 (Minn. Ct. App.), *rev'd in relevant part*, 394 N.W.2d 140 (Minn. 1986).

[21] Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876 (Minn. 1986).

The fifth element, **standard of fault**, varies from case to case depending on the status of the plaintiff within the community, the topic of the allegedly defamatory communication, and the specifics of state law. If the plaintiff is a public official and the topic relates to the official's performance of duty or fitness for office, defamation can be found only if the defendant knew of the falsity of the statement or spoke with reckless disregard of the truth.[23] A school newspaper sued for accusing the superintendent of schools of embezzling district funds would fall into this category. This same standard, known as **actual malice**, also applies in cases involving public figures such as movie stars and communications by individuals who voluntarily involve themselves in matters of public concern.

At the other end of the spectrum, in cases involving private individuals, most states require only a showing of **negligence**, meaning that the defendant was careless about whether the statement was true. A suit against a school newspaper for writing that a student had sexual relations with numerous partners fits in this category. The fault standards for cases falling between these established categories are still somewhat in question, but, in general, cases involving public matters invoke the actual malice standard, and private matters call for a lesser standard of fault.

Public officials and figures have a much heavier burden of proof of defamation than private citizens. Although several Supreme Court cases have defined these categories,[24] the definitions have proved difficult to apply in education cases. Most courts would probably agree that a state or local superintendent of schools is a public official. In one case, a Maryland court ruled that a high school principal was a public official, a classification that most courts would also probably follow.[25] Courts are split regarding teachers and coaches; some consider them private persons[26] and others classify them as public officials.[27]

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[22] W. P. Keeton, ed., Prosser and Keeton on Torts §111 (5th ed. 1984).

[23] New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).

[24] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[25] Kapiloff v. Dunn, 343 A.2d 251 (Md. Ct. Spec. App. 1975).

[26] Moss v. Stockard, 580 A.2d 1011 (D.C. 1990); Dec v. Auburn Enlarged Sch. Dist., 672 N.Y.S.2d 591 (App. Div. 1998); Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984); Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32 (Va. 1987); Franklin v. Benevolent & Protective Order of Elks, Lodge 1108, 159 Cal. Rptr. 131 (Ct. App. 1979); Milkovich v. News-Herald, 473 N.E.2d 1191 (Ohio 1984); True v. Ladner, 513 A.2d 257 (Me. 1986).

[27] Basarich v. Rodeghero, 321 N.E.2d 739 (Ill. App. Ct. 1974); Grayson v. Curtis Publ'g Co., 436 P.2d 756 (Wash. 1967); Elstrom v. Independent Sch. Dist., 533 N.W.2d 51 (Minn. App.

There is even more uncertainty as to what constitutes a matter of public concern and which matters of public concern are related to an official's performance of duties or fitness for office. To date, courts have not provided clear definitions of these concepts. The most that can be said is that a topic is more likely to be judged a matter of public concern if it is the sort of issue that should be open to wide public debate.[28]

Even when the first five elements of defamation can be proved, there are certain situations when, as a matter of law, defendants are immune from a finding of defamation. The sixth and final element of defamation, no privilege, means that defamation can only be found when no such immunity or privilege exists.

An **absolute privilege** protects from liability for defamation even for false, defamatory statements made with malice or intent to harm. An absolute privilege of speech obtains concerning statements made in judicial or legislative proceedings; statements made by certain government executive officers, including superintendents of schools in some states in the course of their duties; statements made with the consent of the person spoken about; and statements made between husband and wife when they are alone. Broadcasters are also immune from suit when a candidate for public office makes a defamatory comment over the air.

Qualified privileges, also called conditional privileges, can be forfeited if the speaker goes beyond the scope of the privilege, uses it for reasons other than for which it was created, speaks with the intent of causing harm,[29] or otherwise abuses the privilege. A commonly used standard finds the privilege to have been abused when the defendant knew the defamatory statement to be false or had no reasonable grounds for believing it to be true.[30] Thus, a qualified privilege may be lost because of actual malice, or a reckless or callous disregard for the truth.[31] In all cases, the defendant has the burden of invoking the privilege, but the plaintiff must establish that it was abused.

Of the various categories of qualified privilege, the ones most relevant to education are those that protect communications to someone who may act in the public interest, protect fair comment on matters of public concern, and protect communications made in the interest of a third party. The first category includes statements made by one public official to another regarding official duties, employee evaluations within an organization,[32] and statements by private citizens about the conduct of public officials. In one case a school board member was protected by the first category of qualified privilege when the board member said that marijuana cigarettes had been found in a student's car.[33] A parental report to school officials and other

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1995); Johnston v. Corinthian Television Corp., 583 P.2d 1011 (Okla. 1978).

[28] Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[29] Karnes v. Milo Beauty & Barber Shop Co., 441 N.W.2d 565 (Minn. Ct. App. 1989); Manguso v. Oceanside Unified Sch. Dist., 200 Cal. Rptr. 535 (Ct. App. 1984).

[30] Gardner v. Hollifield, 549 P.2d 266 (Idaho 1976).

[31] Moss v. Stockard, 580 A.2d 1011 (D.C. 1990).

[32] McCone v. New England Tel. & Tel. Co., 471 N.E.2d 47 (Mass. 1984).

[33] Morrison v. Mobile County Bd. of Educ., 495 So. 2d 1086 (Ala. 1986).

interested parties regarding the allegedly harmful behavior of a teacher would fall into the first and second categories of qualified privilege.[34]

In some states, common law includes postemployment letters of reference in the third category of qualified privilege.[35] In addition, about half the states have adopted employee reference statutes that specifically extend a qualified privilege to employers and supervisors in the writing of letters of recommendation.[36] These statutes vary somewhat, but they generally permit employers who have received a request from a former employee for a reference to reveal job performance information about the former employee. The privilege is lost if the employee can show by preponderance of evidence that false and defamatory information was conveyed with actual malice or with reckless disregard for the truth.

As executive officers, superintendents may enjoy absolute privilege regarding false and defamatory statements made in the performance of their job. One court found that a superintendent could not be held liable for defamatory statements contained in a letter of reprimand placed in a teacher-coach's personnel file.[37] However, in the same case, the court extended only qualified immunity to the superintendent regarding a statement he issued to the press. The current trend in most states is to extend only qualified immunity to local government bodies and officials such as school board members and superintendents of schools.

In some states, parents enjoy absolute immunity when airing complaints about a teacher at a school board meeting. Thus, a New York court ruled that parents enjoyed absolute immunity from a libel suit regarding a petition filed with the school board. In that petition, the parents claimed that the teacher had missed classes, struck a student, threatened bodily harm to a student's mother, accused a student of being a liar without justification, and insulted a student with an ethnic slur.[38] However, some states extend only a qualified privilege to parents.[39]

A privilege that may be invoked regarding school board meetings and other forums of debate of educational issues is known as the **fair report** privilege. The fair report privilege protects fair and accurate reports of governmental proceedings, official actions, and even nongovernmental proceedings that deal with matters of public concern.[40] The value of the privilege is that it protects a defendant against liability even when the defendant repeats a defamatory statement that was made during a proceeding and even if the defendant knows the reported assertions are false; the privilege is not limited to reporting on public officials or public figures. Once the defendant has made a prima facie case for the fair report privilege, the burden shifts to the plaintiff to establish that the privilege should not operate because of substantial inaccuracy or unfairness of the report.[41] The privilege is not lost if the report of the proceedings is substantially accurate.

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[34] Segall v. Piazza, 260 N.Y.S.2d 543 (Sup. Ct. 1965).

[35] Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963); Restatement (Second) of Torts §596 (1977); J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. Chi. L. Rev. 115 (1998).

[36] Alex B. Long, *Note: Addressing the Cloud over Employee References: A Survey of Recently Enacted State Legislation*, 39 Wm. & Mary L. Rev. 177 (1997).

[37] Santavicca v. City of Yonkers, 518 N.Y.S.2d 29 (App. Div. 1987).

[38] Weissman v. Mogol, 462 N.Y.S.2d 383 (Sup. Ct. 1983).

[39] Desselle v. Guillory, 407 So. 2d 79 (La. Ct. App. 1981).

[40] Restatement (Second) of Torts, §611 (1977); Warren v. Pulitzer Publ'g Co., 78 S.W.2d 404 (Mo. 1934) (church proceeding).

The most common defamation suits in education involve reference letters written by administrators to prospective new employers. Generally, plaintiffs will not win these suits unless the recommender acts with malice or otherwise abuses the qualified privelege.[42] Thus, to avoid the possibility of an adverse finding of defamation, a recommender need only make a good faith effort to accurately convey relevant information. Minor inaccuracies, inadvertent errors of fact, and honestly-offered adverse evaluations of performance will not support a finding of defamation. In cases when a recommender knowingly and maliciously distorts the truth to prevent a former employee from securing a new job, damages may be awarded to compensate the employee for harm done to reputation, loss of earnings, and mental anguish. In severe cases, punitive damages may also be awarded. False and malicious recommendations that prevent an applicant from securing a job can also lead to liability under another tort known as **intentional interference with prospective contractual relations** and, in some states, criminal liability under antiblacklisting statutes.

Despite the considerable protection built into the law for recommenders who act in good faith, many school districts have become overly cautious about the recommendations they provide for former employees. Some schools refuse to provide any recommendations at all, and others provide only positive recommendations whether deserved or not. Although effectively eliminating possible lawsuits for defamation, the no-recommendations policy is extremely unfair and detrimental both to praiseworthy former employees and to prospective future employers of ineffective former employees. To combat this trend, thirteen states have enacted "service-letter" statutes giving employees the right to receive written confirmation of employment from former employers; however, most of these statutes are of limited use as they only require provision of dates of employment and positions held.

The policy of providing falsely positive recommendations even to employees fired for serious incompetence or wrongdoing, although educationally and morally indefensible, seems in most states to be free from legal risk. A New York court expressly rejected a negligence claim (see sec. 12.4) against a school that failed to disclose that a teacher had a record of sexual misconduct.[43] However, at least in theory, an employer who either fails to disclose negative information or misrepresents an employee in a positive way could be held liable for negligent nondisclosure or misrepresentation.[44] The California Supreme Court has actually applied this theory in one extreme case: Three school districts, former employers of Robert Gadams, wrote extremely positive letters of reference containing such comments as, "I wouldn't hesitate to recommend Mr. Gadams for any position." None of the letters mentioned Gadams' long history of improper sexual contact with students in all three school districts. Gadams was hired by a fourth district where he sexually assaulted the plaintiff. The plaintiff brought suit against the former employers. The court found that the letters recommending Gadams without reservation or qualification "constituted affirmative representations that strongly implied Gadams was fit to interact appropriately and safely with female students. These representations were false and misleading in light of defendants' . . . knowledge of charges of Gadams' repeated sexual improprieties." Having undertaken to provide some information about Gadams' fitness as a teacher, said the court, the former employers had an obligation to disclose all other facts that materially qualified the facts disclosed: "[T]he writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial foreseeable risk of physical injury to third persons."[45]

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[41] Restatement (Second) of Torts §§613(1)(h), 619(2) (1977).

[42] *See*, Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963).

[43] Cohen v. Wales, 518 N.Y.S.2d 633 (1987).

[44] W.P. Keeton, ed., Prosser and Keeton on Torts, Chap. 18 (5th ed. 1984).

12.3 INVASION OF PRIVACY, STUDENT RECORDS, AND THE DUTY TO REPORT CHILD ABUSE

Closely related to defamation, **invasion of privacy** is a multifaceted tort that can be committed in four different ways: appropriation or use of a person's name or likeness for gain, such as using the name of a movie star to promote a product without permission; unreasonable intrusion on the seclusion of another; unreasonable publication of private facts about another—the unreasonable publication must involve public disclosure of private facts, and the matter made public must be highly offensive and objectionable to a reasonable person of ordinary sensibilities (the truth of the private facts is not a defense); and unreasonable publication that places another in a false light in the public eye.

Although unusual in school contexts, invasion of privacy may occur if school officials disclose information about teachers or students concerning sexual behavior, medical history, family problems, school performance, substance abuse, socioeconomic status, or other private matters for reasons not supported by legitimate educational concerns. For example, school officials should be careful to inform only those who have a need to know that a teacher or student has AIDS. However, not everything that a person wishes to keep secret is considered a private matter by the law. In one case, school officials spoke with the media about an incident in which three teachers were in an alcohol-related accident following a retirement party. An Oregon appellate court reversed a verdict of invasion of privacy against the school officials because the accident and the school district's campaign to stop drinking were public knowledge and the disciplinary record of the teachers was public information under state law.[46]

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[45] Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 (Cal. 1997).
[46] Trout v. Umatilla County Sch. Dist., 712 P.2d 814 (Or. 1985).

Invasion of privacy may also be claimed in connection with unjustified searches, including drug testing, of students or teachers. A Texas court ruled that an employer's search of an employee's locker and a purse found in the locker could create liability for invasion of privacy.[47] The West Virginia Supreme Court ruled that random drug testing of employees was an unwarranted invasion of privacy, but testing upon reasonable suspicion was not.[48] (Recall that unjustified searches and drug testing can also violate the constitutional rights of students and teachers.)

In some situations, the law recognizes a **privilege to disclose private facts** as a defense against invasion of privacy. The privilege may be absolute (e.g., when one is a witness at a trial) or qualified, as when an employer makes internal disclosures of private information about an employee.[49] Similarly, educators have a qualified privilege to disclose private information about a student to another educator or to a former student's new school on a need to know basis.

STUDENT RECORDS

Concerns about the privacy and contents of student records engendered considerable litigation and state legislative activity during the 1960s and early 1970s.[50] Critics complained that school records often contained unfounded, erroneous, or irrelevant information and that records were kept secret from parents and children but routinely released without permission to police, employers, creditors, and any one else who asked. Several state and federal courts held that parents had a common law or due process right to inspect their children's school records under certain conditions and about half of all states granted parents access to records by statute.

In 1974, Congress enacted the **Family Education Rights and Privacy Act (FERPA)**, often called the **Buckley Amendment**.[51] The act is designed to protect the privacy of students and assure fairness in the keeping and use of school records. School records include most materials directly related to a student and maintained by the school district. However, certain type of records are not included: personal instructional records of teachers kept in the teachers' sole possession and shown only to substitute teachers; records of a law enforcement unit of a school district; and records of a physician, psychiatrist, psychologist, or other recognized healthcare professional or paraprofessional, made, maintained, or used only in connection with the treatment of a student.

All rights conferred by the act belong to parents until the child reaches eighteen years of age after which they belong to the former child and no longer to the parents. The act requires that parents, including noncustodial natural parents,[52] be granted access to all records maintained by the school concerning their child within a reasonable period of time, in no case more than forty-five days after requesting it. After inspecting the records, parents have a right to request the modification of any portion they believe false, misleading, or violative of privacy or other rights of their child. If the school refuses to modify the record, parents must be given a full and fair hearing before an impartial hearing officer to decide whether the record will be changed. At the hearing, each side may be represented by counsel, present evidence, call witnesses, and cross-examine the other's witnesses. The hearing officer must render a decision in writing based solely on the evidence and testimony presented at the hearing with nothing outside the record considered. Should the parents prevail, the school must modify the record in accordance with the hearing officer's findings. Even if the school prevails, parents must still be allowed to add a statement to the record presenting their side of the story.

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[47] K-Mart Corp. v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984).

[48] Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990).

[49] Bratt v. International Bus. Machines Corp., 467 N.E.2d 126 (Mass. 1984).

[50] Van Allen v. McCleary, 211 N.Y.S.2d 501 (Sup. Ct. 1961).

[51] 20 U.S.C.A. § 1232h; 34 C.F.R. § 99.1 et seq.

[52] Matter of Unido R., 441 N.Y.S.2d 325 (Fam. Ct. 1981).

In addition to making school records available to parents, FERPA requires that they be kept confidential from all others with certain specified exceptions. Records may be shown to educators within the school system who have a legitimate educational interest in them, but a log must be kept of all those viewing the record. Records may be sent to other schools in which the student seeks to enroll or in response to a subpoena, but in both cases parents must be notified. Schools may disclose personally identifiable information to appropriate parties in connection with an emergency if the information is necessary to protect the health or safety of the student or other individuals. Records may also be shown to state and federal education agencies for research and statistical purposes. Otherwise, records must not be released without written permission of the parents except that the school may, if it wishes, provide "directory" information such as names, addresses, fields of study, activities, and awards.

Several students and parents have attempted to base lawsuits against schools on FERPA; however, most courts have held that the Act gives no private right of action, meaning that an individual may not sue in court to modify a school record or to allege a violation of FERPA.[53] One court held that FERPA may be the basis for a damage suit against a school when combined with another federal statute, Section 1983 (see sec. 12.9).[54] Additionally, a school that fails to comply with FERPA may have federal funds withheld by the Secretary of Education, and educators may be liable for damages if statements contained in student records are libelous or invasive of privacy.

REPORTING CHILD ABUSE

Although exact figures on the incidence of child abuse are unavailable, conservative estimates conclude that a million or more children are abused each year. In response to this social tragedy, all fifty states have enacted statutes requiring that cases of actual or suspected child abuse be reported to various authorities. Although these laws vary among the states, they tend to embrace a broad definition of child abuse, including physical and emotional abuse, neglect and abandonment, incest, sexual molestation, and sexual exploitation, including using children for pornographic purposes.

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[53] Price v. Young, 580 F. Supp. 1 (E.D. Ark. 1983).
[54] Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986).

The duty to report suspected incidents of child abuse generally extends to health practitioners and those who work in positions involving child care, including teachers, school administrators, and other school personnel. In addition to those required to report suspected child abuse, any person with reasonable cause to suspect that a child was abused may make a report. Reports must be made to a specifically designated state agency responsible for child protective services. In some states, the law also requires that school employees notify the person in charge of the school or a designated agent, who then becomes responsible for making the report. The law thus anticipates that each school will have a properly developed internal system for processing child abuse reports. The law may also impose a duty on the school to provide all current and new employees with written information explaining the reporting requirements.

If there is an initial oral report, it must typically be followed by a written report that includes the name and address of the child; the name and address of the child's parent or guardian; the child's age, sex, and race; the nature and extent of the suspected abuse; information regarding prior injuries or abuse; information regarding the abuse of siblings; the name of the person allegedly responsible for the abuse; the name and address of the person making the report; and actions taken by the reporting source.

Because of the great importance of protecting children from abuse and to allay fears of legal reprisals, the law grants immunity from civil and criminal liability to people who report child abuse. In some states the immunity is absolute, meaning there is no liability even for maliciously and knowingly submitting a false report.[55] In other states, immunity is only granted for reports made in good faith. Good faith will be presumed if the reporters were "acting in discharge of their duties and within the scope of their employment," and if the report did not result from "willful misconduct or gross negligence."[56]

Despite the availability of legal immunity, educators often hesitate to make child abuse reports. The failure to make a report that the law requires is a misdemeanor that exposes the educator to the possibility of criminal prosecution. There is also the possibility of civil liability, for example, for harm done to a child by an abuser that might otherwise have been prevented. It is, therefore, legally imperative that educators file a report whenever they have reasonable cause to suspect that child abuse has occurred. In addition to actual observations of abuse and of its consequences, such as a pattern of poorly explained bruises and other injuries, a reasonable suspicion of abuse might be based on conversations with the child, the parents or other suspected abuser, or the child's friends. A professional assessment of the child by the school psychologist may provide further supporting evidence, as would knowledge of prior abusive behavior by the suspected abuser. When making a report, an effort should be made to repeat accurately what the child and other people interviewed actually said.

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[55] Storch v. Silverman, 186 Cal. App. 2d 671 (Ct. App. 1986).

[56] N.Y. Soc. Serv. Law § 419.

12.4 NEGLIGENCE

The single most common type of litigation in education is students suing school districts and educators because they were injured at school. These suits raise the issue of negligence. Negligence can be defined as the failure to exercise reasonable care resulting in harm to another person. Ordinary negligence is not a crime, but some negligent acts expose a person both to a civil tort suit for negligence and separate criminal charges. An example is a car accident caused by driving while intoxicated that seriously injures another person.

A finding of negligence requires the plaintiff to prove the existence of each of four elements. The failure of the plaintiff to establish any of the elements precludes a finding of negligence:

1. **Duty and standard of care**. The defendant owed a legal duty to the plaintiff to conform to a standard of care established by law.
2. **Breach of duty**. The defendant failed to live up to the standard of care.
3. **Legal cause**. The defendant's behavior resulted in harm to the plaintiff.
4. **Injury and damages**. The plaintiff sustained an actual injury, one that can be measured in monetary terms.

DUTY AND STANDARD OF CARE

Despite the fears of many educators, not all accidents or injuries create liability for negligence. Negligence can be found only in connection with behavior that "falls below the standard established by law for the protection of others against unreasonable risk of harm."[57] The generally applicable standard of behavior established by statute or common law in most situations is that of a reasonable person acting prudently in light of the circumstances. Thus, in order to avoid a finding of negligence, every person has a duty always to act as would a hypothetical reasonable person.

If a person fails to live up to this duty and injury or other harm to another person results, there may be liability for negligence. No one is liable, however, for accidents that were unavoidable, not foreseeable, or not preventable by reasonable precautions. Thus a school bus driver would be liable for injuries caused by careless driving, but a bus driver with no history of heart trouble would not be liable for an accident resulting from a sudden heart attack.

Because of the responsibilities inherent in their jobs and the special skills teachers are supposed to possess, educators in most states are held to a different and generally higher standard of behavior than ordinary citizens.[58] Teachers are expected to do a better job of protecting students from injury than an average reasonable and prudent person would. For example, if a visitor to a school sees students throwing ice balls at each other on the playground, ignoring the students would not fall below the required standard of care. However, if a teacher assigned to supervise the playground ignored the ice ball fight, the teacher's behavior would be below the applicable standard.[59] In some states, the standard of care applicable to school personnel may vary depending on the specific job or activity the employee is performing. Educators who establish a "special relationship" with a student—for example, by promising to protect a student who has been threatened—may be held to an especially high standard of care.[60]

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[57] Restatement (Second) of Torts § 282 (1965).

States vary regarding the duty of care imposed by law on school officials. Some states' tort laws require the care of a "reasonably prudent parent," however, Illinois teachers are liable only for willful and wanton misconduct.[61] Regarding the furnishing of equipment to students, Illinois imposes a stronger standard—"ordinary prudence." A Michigan statute holds that when disciplining students, a school official is liable only for gross abuse and disregard of the student's health and safety.[62] By contrast, regarding the operation of school buses, a few states impose an extraordinary duty of care.[63]

The reasonable and prudent teacher is a fictitious person who sets an objective standard of behavior. What the judge or jury determines this hypothetical person would have done in a given situation is the standard against which the behavior of an educator charged with negligence is measured. If the teacher is physically disabled, the standard of conduct is that of a reasonable teacher with a like disability. Expert testimony from other teachers and educators can help to establish the professionally expected norms of conduct.[64]

In general, the higher standard of care expected of educators obtains only when they are on the job. Thus, with the exception of school-sponsored events, there is usually no duty to supervise or protect students off school grounds or outside school hours beyond that of an ordinary citizen.[65] Courts have generally not held schools liable for criminal assaults on students by third parties on nonschool property contiguous to the school unless school officials had specific knowledge of imminent criminal activity or prior incidents suggested that a criminal assault was foreseeable.[66] However, a

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[58] *But see*, Albers v. Community Consol. #204 Sch., 508 N.E.2d 1252 (Ill. App. Ct. 1987).

[59] Cioffi v. Board of Educ. of N.Y., 278 N.Y.S.2d 249 (App. Div. 1967).

[60] Greene v. City of New York, 566 N.Y.S.2d 875 (App. Div. 1991); Gammon v. Edwardsville Community Unit Sch., 403 N.E.2d 43 (Ill. App. Ct. 1980). *Cf.*, Logan v. City of New York, 543 N.Y.S.2d 661 (App. Div. 1989).

[61] Albers v. Community Consol. #204 Sch., 508 N.E.2d 1252 (Ill. App. Ct. 1987).

[62] Atkinson v. DeBraber, 446 N.W.2d 637 (Mich. Ct. App. 1989).

[63] Norris v. American Casualty Co., 178 So. 2d 662 (La. 1965).

[64] Lehmuth v. Long Beach Unified Sch. Dist., 348 P.2d 887 (Cal. 1960).

[65] Bennett v. Board of Educ. of N.Y., 226 N.Y.S.2d 593 (App. Div. 1962), *aff'd*, 196 N.E.2d 268 (N.Y. 1963); Palella v. Ulmer, 518 N.Y.S.2d 91 (Sup. Ct. 1987); Cobb v. Fox, 317 N.W.2d 583 (Mich. Ct. App. 1982).

[66] Brownell v. Los Angeles Unified Sch. Dist., 5 Cal. Rptr.2d 756 (Ct. App. 1992).

Louisiana court found a school liable for a shooting on contiguous property, ruling that the district had assumed the affirmative duty of protecting its pupils on contiguous property when it hired a security counselor who was stationed outside the school during the noon hour.[67] A district also may be held liable for injuries to a student off school grounds if the student was able to leave the school because of negligent supervision.[68]

Some courts have said that, depending on circumstances, educators may be held liable for failing to supervise students just before or after formal school hours.[69] In a case in which a pedestrian was hit by a student "peeling" out of a school parking lot, a California court held that a school district had a duty to nonstudents to supervise students as they drove out of the school parking lot.[70] Also, if educators voluntarily undertake supervision of students who arrive early or stay late, the applicable standard of care is that of an educator, not an ordinary citizen.[71]

Under certain circumstances, principals and other school administrators may owe a duty to students to ensure that teachers are properly supervising them. In one case, the Supreme Court of Minnesota ruled that a principal was legally liable to a student who sustained quadriplegic paralysis as a result of the faulty execution of a gymnastic exercise. The student was being supervised by a recently-hired physical education teacher who was also held legally responsible for his negligent supervision. The principal was found liable on the grounds that he was negligent in entrusting the physical education program to an inexperienced teacher without providing closer supervision, for failing to instruct the teacher to refer to a bulletin on physical education published by the state department of education, and for failing either to require the former teacher to develop a plan for the new teacher or to require the new teacher to develop a detailed plan.[72]

Courts have generally held that schools do not have a duty to protect teachers from attacks by students.[73] However, there are some exceptions. In a New York case, a principal assigned a student with violent propensities to a class being taught by a substitute teacher. The teacher sued the school after being assaulted by the student. The court ruled that the school had a duty to inform the teacher of the student's tendency to violence.[74] A duty to protect teachers may also exist if a school district establishes a special relationship with its teachers, for example, if the district's contract with the union requires the district to establish a security system to protect teachers from assaults by students. Most injuries to teachers at school, whatever the cause, are covered by worker's compensation, which usually precludes a suit for negligence (see sec. 10.8).[75]

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[67] Peterson v. Doe, 647 So. 2d 1288 (La. Ct. App. 1994).

[68] Hoyem v. Manhattan Beach Sch. Dist., 585 P.2d 851 (Cal. 1978).

[69] Toure v. Board of Educ. of N.Y., 512 N.Y.S.2d 150 (App. Div. 1987).

[70] Hoff v. Vacaville Unified Sch. Dist., 68 Cal. Rptr. 2d 920 (Ct. App. 1997).

[71] Titus v. Lindberg, 228 A.2d 65 (N.J. 1967); Barnes v. Bott, 571 So. 2d 183 (La. Ct. App. 1990).

[72] Larson v. Independent Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1979).

[73] Krakower v. City of New York, 629 N.Y.S.2d 435 (Sup. Ct. 1995).

[74] Ferraro v. Board of Educ. of N.Y., 212 N.Y.S.2d 615 (App. Div. 1961), *aff'd*, 221 N.Y.S.2d 279 (App. Div. 1961).

[75] Scionti v. Board of Educ. of Middle Country Cent. Sch. Dist., 638 N.Y.S.2d 748 (App. Div.

BREACH OF DUTY

Generally, the key to determining whether an educator's conduct fell below the required standard of care turns on the question of whether the educator should have foreseen the resulting injury. The mere existence of an injury is not proof that the standard of care has been breached. School officials are not expected to prevent every conceivable injury, only to take reasonable precautions designed to prevent foreseeable injuries. Nor is the absence of a teacher when an injury occurs in itself proof of breach of duty. Schools are not ordinarily required to supervise every student every minute of the school day, although the longer students are left alone, the more likely a finding of breach of duty.

Different school activities pose different sets of known dangers, and appropriate precautions must be taken accordingly. Students must be properly instructed in the performance of potentially dangerous activities in advance. Supervision and precautions must increase if past occurrences indicate an increased likelihood of danger. The age, capacity, and past behavior of students are also relevant to the foreseeability of danger. The likelihood of a finding of breach of duty is increased if a state law, regulation, or a school's own policy is violated. Ultimately, however, the determination of foreseeability and breach of duty occurs on a case-by-case basis.

The following are examples of cases where students were injured and educators were found to have breached their duty of care:

- A regular classroom teacher left a lighted candle on her desk, and a child whose costume came in contact with the flame was badly burned.[76]
- A teacher left a classroom of mentally retarded teenagers unattended for a half hour, and one student threw a wooden pointer, injuring the eye of another.[77]
- A student was abducted from school by an intruder and raped. The doors of the school were not locked, and there was a history of sexual assaults and other violent crimes in the neighborhood.[78]
- A student was pushed out of a bathroom window by other students in a school with racial tensions.[79]
- On the school playground, students engaged in slap boxing for five to ten minutes until one student fell, mortally fracturing his skull.[80]
- A student was injured when permitted to wear mittens while playing on the jungle gym.[81]
- Students were required to play a game of line soccer in the gym with little experience or technical instruction in soccer skills. A melee occurred

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1996).

[76] Smith v. Archbishop of St. Louis, 632 S.W.2d 516 (Mo. Ct. App. 1982).

[77] Gonzalez v. Mackler, 241 N.Y.S.2d 254 (App. Div. 1963).

[78] District of Columbia v. Doe, 524 A.2d 30 (D.C. 1987).

[79] Lauricella v. Board of Educ. of Buffalo, 381 N.Y.S.2d 566 (App. Div. 1976).

[80] Dailey v. Los Angeles Unified Sch. Dist., 470 P.2d 360 (Cal. 1970) (en banc).

[81] Ward v. Newfield Cent. Sch. Dist. No. 1, 412 N.Y.S.2d 57 (App. Div. 1978).

as the students kicked for possession of the ball, and one student was hurt.[82]

- In shop, a student was injured using a drill press while the instructor, who had not properly instructed students in use of the press or provided safety warnings, was absent from the shop.[83]
- A fifteen-year-old student employee stole chemicals from an unlocked chemistry lab and left them in bushes outside the school. The chemicals were found by an eight-year-old boy who was burned when he put a match to them.[84]
- On a school-sponsored field trip, a child unsupervised while swimming in the ocean was hurt by a rolling log.[85]
- After classes, a student had an accidental run-in with another student who then threatened her with death. Plaintiff informed a teacher and sought help in the security office but there were no security personnel in the office or in their assigned locations at the time students were leaving school. When the plaintiff and her sister were attacked in the school building there was no assistance available to them.[86]
- A student who was attending a school event in a park near the school was given permission to leave the park to obtain lunch at a nearby pizzeria. While the student was in the pizzeria, her class left the park. When she returned to the park and could not find her class, she proceeded to walk home alone at which time she was accosted and raped.[87]
- Two school counselors were informed by a student's friends that the student intended to kill herself. After the student did kill herself, a court held the counselors had a duty to use reasonable means to prevent the suicide and that they breached that duty when they failed to warn the student's parents.[88]

LEGAL CAUSE

In all states, the law imposes liability only for harms that are reasonably closely associated with negligent conduct. Generally, a finding of legal cause requires that two conditions be met: (a) **causation in fact**: that the injury be a result of the negligent party's act and (b) **proximate cause**: that the act be sufficiently connected to the injury to be considered its cause. (The term "proximate cause" is often also used synonymously with "legal cause" to encompass both requirements.) Different states seem to interpret the notion of legal cause differently, and it is not always easy to reconcile cases even within the same state.

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[82] Keesee v. Board of Educ. of N.Y., 235 N.Y.S.2d 300 (Sup. Ct. 1962).

[83] Roberts v. Robertson County Bd. of Educ., 692 S.W.2d 863 (Tenn. Ct. App. 1985).

[84] Kush v. Buffalo, 449 N.E.2d 725 (N.Y. 1983).

[85] Morris v. Douglas County Sch. Dist. No. 9, 403 P.2d 775 (Or. 1965) (en banc).

[86] Mirand v. City of New York, 637 N.E.2d 263 (N.Y. 1994).

[87] Bell v. Board of Educ. of N.Y., 687 N.E.2d 1325 (N.Y. 1997).

[88] Eisel v. Board of Educ. of Montgomery County, 597 A.2d 447 (Md. 1991).

A widely used test for causation in fact is the **but-for** requirement: A person's behavior is the cause of an injury if the injury would not have occurred but for the behavior. An act or omission is not a but-for cause of an injury if it would have happened regardless of what the defendant did. For example, a school fails to erect a fence around the school yard. A truck driver loses control and enters the school yard killing a student. The failure to install the fence is not the proximate cause of the death if the truck would have crashed through the fence had it been there and still killed the student.

Even when the but-for requirement is met, courts sometimes fail to find proximate cause for reasons of fairness or public policy when an injury is separated from its but-for cause by time, space, or intervening events. Consider the following example: John is walking around the chemistry lab with a glass container filled with an explosive liquid. The teacher, Miss Smith, is in the supply closet for a half hour. Jim, a student with roughhousing tendencies, pushes John. The container falls and sets off an explosion. The impact of the explosion knocks a large vase off a shelf in another room across the hall. The vase hits the floor, breaks and fragments of glass embed in Ellen's eye. Ellen sues Smith for negligence.

Arguably Smith's absence is a but-for cause of the accident. Had she been present, she might have prevented John from walking around with the dangerous liquid or might have controlled Jim's roughhousing. But, should Smith's actions be considered a proximate cause of Ellen's injury? As a matter of public policy and fairness, are people to be held liable for any bizarre chain of events their behavior might set into motion? How proximate does a cause have to be?

Generally courts do not find proximate cause in cases like the one described above;[89] however, there is no set rule for determining when an act is sufficiently closely connected to a consequence to be considered a proximate cause. Among the tests courts have employed are to find defendants responsible for the but-for consequences of their acts that are foreseeable harms, directly traceable harms, or, in retrospect, not highly extraordinary. Using any of these tests would appear to absolve Smith from negligence in connection with Ellen's injury.

The Smith hypothetical also raises the issue of **intervening causes**. Suppose a defendant's carelessness contributes to an injury but so does another independent cause arising subsequent to the defendant's behavior. For example, the defendant sets a fire and afterward a wind springs up spreading the fire. The question is whether the defendant is not liable because of the subsequent event. Generally, the courts hold the defendant liable even in the face of an intervening cause if the intervening cause was foreseeable. Thus, a teacher who leaves a lighted candle on her desk can foresee that a misbehaving child might push another child into the candle. Similarly, a teacher who fails to fulfill assigned hall duty in a school in a high crime neighborhood could foresee that an intruder might enter the school and harm a student. However, a teacher who sends students to the playground without proper supervision could not foresee they might be injured by an earthquake.

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[89] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

In the following instances, the courts concluded that legal cause had not been proven:

- A fourteen-year-old student left school in the middle of the day and went joyriding. A high-speed police chase resulted in a serious car accident in which the boy was hurt. The parents sued the school claiming negligence regarding, among other things, the failure of the school of notify them of their son's truancy. The court ruled that failure to notify of the truancy was not a legal cause of the student's injury.[90]
- At the noon recess a student threw a small rock that hit a larger rock on the ground and bounced up to strike another student in the eye. The supervising teacher had just walked past this group of boys when the incident occurred. The court ruled that "[w]here the time between an act of a student and injury to a fellow student is so short that the teacher had no opportunity to prevent injury, it cannot be said that negligence of the teacher is a proximate cause of the injury."[91]

INJURY AND DAMAGES

In addition to establishing a breach of a standard of care and legal cause, the plaintiff must establish the existence of an injury and the monetary value of the injury. If a previous injury of the plaintiff is aggravated by the defendant, the defendant is liable only for the additional loss. The plaintiff generally can collect monetary compensation for losses such as damage to property, physical injury (including past and future medical expenses), lost earnings, pain, and emotional distress. Most courts do not permit recovery for emotional distress unaccompanied by physical injury, illness, or other physical consequences.

AFFIRMATIVE DEFENSES

Even if all four elements of negligence are proven, a defendant's liability may be eliminated or reduced by the existence of one or more factors. The most common of these defenses are contributory negligence, comparative negligence, and assumption of risk. The burden is on the defendant to raise and prove an affirmative defense.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is conduct on the part of the plaintiff below a reasonable standard of care for self-protection that contributes along with the defendant's behavior to the plaintiff's injury. The principles of proximate cause apply to the contributory negligence defense. Historically, and still in a few states today, if the defendant could prove contributory negligence on the part of the plaintiff, the plaintiff could not recover any damages. This was true whether the plaintiff's own negligence was slight or extensive.

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[90] Palella v. Ulmer, 518 N.Y.S.2d 91 (Sup. Ct. 1987).
[91] Fagan v. Summers, 498 P.2d 1227 (Wyo. 1972).

The standard of care children owe themselves depends on their age, experience, and capacities. Thus, the same behavior by a seventeen-year-old and ten-year-old might be viewed differently, with the elder being held contributorily negligent but not the younger. In some states, children below a certain age, often seven, are presumed by law to be incapable of being contributorily negligent. The contributory negligence defense may be effective in cases where older students disobey express instructions regarding the use of dangerous equipment in shop or dangerous maneuvers in gym,[92] or if older students mix chemicals just to see what might happen or with the deliberate intention of building a bomb.[93]

COMPARATIVE NEGLIGENCE

The contributory negligence doctrine can produce an unfortunate outcome: Slight negligence on the part of the plaintiff can let a more negligent defendant off the hook. Hence an increasing majority of states have substituted the comparative negligence doctrine. Comparative negligence holds that plaintiffs whose negligence contributes to their own injuries can recover damages only for the portion of the injury attributable to the defendant's negligence. Comparative negligence does not totally bar recovery by the plaintiff, but it reduces the damages in proportion to the plaintiff's fault. Some states have modified comparative negligence rules to bar recovery if the plaintiff's negligence was more than fifty percent or greater than the defendant's.

In one case where the comparative negligence defense was used, a seventh-grade student broke his leg playing a pick-up game of tackle football in violation of school rules. The teacher was ruled negligent for not seeing and stopping the game, but the court also ruled the boys were old enough to know that tackling could cause injury. Thus, the court reduced the percentage of fault attributable to the teacher and school board to five percent. The plaintiff was allowed to recover $10,000 rather than the $200,000 awarded by the trial court.[94]

ASSUMPTION OF RISK

A plaintiff can relieve the defendant of liability by expressly or implicitly recognizing a danger and voluntarily assuming the risk. Voluntary participants in athletic contests assume the risk of the normal hazards of the sport. Spectators who sit near the sidelines of a playing field assume the risk of being hurt by players crashing into them in the normal course of the game.

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[92] Izard v. Hickory City Sch. Bd. of Educ., 315 S.E.2d 756 (N.C. Ct. App. 1984).

[93] Wilhelm v. Board of Educ. of N.Y., 227 N.Y.S.2d 791 (App. Div. 1962); Hutchinson v. Towes, 476 P.2d 811 (Or. Ct. App. 1970).

[94] Marcantel v. Allen Parish Sch. Bd., 490 So. 2d 1162 (La. Ct. App. 1986).

To successfully employ the defense of assumption of risk, the defendant must establish that the plaintiff knew the risk was present. The plaintiff's age and level of experience will be considered. It must also be shown that the plaintiff understood the nature of the risk and that the assumption of the risk was voluntary. A person may not consent to assume a risk if confronted with a choice of evils, under duress, or given no choice. Even valid assumptions of risk are limited to the normal risks associated with the activity. For example, a football player does not consent to deliberate infliction of injury by other players in violation of the game's rules or assume the risks of substandard equipment or poorly maintained fields.[95]

Schools often try to protect themselves from potential lawsuits by asking parents to sign forms indicating an awareness of the dangers connected with an activity, assuming the risk, and releasing the school from liability. But are these forms legally effective? For example, is a school district immune from suit if parents sign a consent and waiver of liability enabling their child to participate in a school field trip? At a minimum, for releases from liability to be effective they must be voluntary and knowingly executed[96] and specifically indicate what fault is being waived. Even when these conditions are met, a number of courts have ruled that waivers by schoolchildren or their parents are contrary to public policy.[97] In a significant number of jurisdictions any ambiguity in a waiver will be interpreted against the school district.[98] Other courts have said that although waivers may be valid as to the parents, they do not block suits by the injured children themselves.[99] Thus, release forms often do not block redress for a school's negligence, but they do serve the useful purpose of showing that parents agreed to expose their children to the dangers normally associated with an activity.[100]

In sum, the law of negligence does not require that schools be insurers against all harms that may come to students. Constant and unremitting vigilance and supervision are not required. What is always required, however, is the care that a reasonable and prudent person would take in the circumstances. When unusual dangers exist, such as the presence of students with a known propensity for violence, special caution must be employed. This duty extends to principals, teachers, bus drivers, and all other personnel placed in a position of supervising students.

Furthermore, school boards and school administrators have a duty to ensure adequate levels of supervision depending on the circumstances and the age and capacities of the pupils. Similarly, they have a duty to provide safe shop, laboratory, and gym equipment and proper instruction and warnings regarding the performance of potentially dangerous tasks. State health and safety regulations must be enforced as well as the school's own rules.

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[95] *See*, Benitez v. New York City Bd. of Educ., 541 N.E.2d 29 (N.Y. App. 1989).

[96] Whittington v. Sowela Technical Inst., 438 So. 2d 236 (La. Ct. App. 1983).

[97] Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968 (Wash. 1988) (en banc).

[98] Doyle v. Bowdoin College, 403 A.2d 1206 (Me. 1979).

[99] Fedor v. Mauwehu Council, Boy Scouts of America, 143 A.2d 466 (Conn. Super. Ct. 1958).

[100] *See*, Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647 (Ct. App. 1990).

Appropriate medical care should be provided in the case of accidents. If supervision is undertaken when not required by law, it must still meet legal standards of adequacy.

The following cases illustrate the application of the principles of the law of negligence in cases involving schools and educators.

BARBIN v. STATE

Court of Appeal of Louisiana, 1987
506 So. 2d 888

Crain, Judge.

On March 17, 1981, Carey G. Barbin suffered personal injuries as the result of an accident which occurred while participating in a woodworking class in which he was enrolled at the Louisiana School for the Deaf. Carey was twelve years old at the time of the accident and has been deaf and mute since birth. Under the supervision of Leo Burke, the woodworking instructor, Carey proceeded to operate a table saw without the use of the safety guard. His right index finger came into contact with the blade, resulting in a longitudinal cut from the tip of his finger into the proximal interphalangeal joint.

This action was instituted by Huey J. Barbin on his own behalf and on behalf of his minor son, Carey Barbin. Named-defendants are Burke, the Louisiana School for the Deaf, and the State of Louisiana through the Department of Education, State Board of Elementary and Secondary Education. . . .

After trial on the merits judgment was rendered in favor of Huey J. Barbin personally in the sum of $5,752.10 and on behalf of Carey Barbin against Burke and the State of Louisiana through the Board of Elementary and Secondary Education, in solido in the sum of $185,000. . . .

From this judgment . . . Burke appeals alleging several assignments of error.

NEGLIGENCE OF BURKE

In the first assignment of error appellants allege that the trial court erred in finding Burke liable for Carey's injuries.

The following facts are uncontested: With the safety guard in place it was virtually impossible for the operator's fingers to come into contact with the blade. The safety guard had not properly functioned since 1979. Use of the saw with the malfunctioning safety guard in place exposed the operator to the potential danger that the safety guard might come into contact with the blade and forcefully push the item being sawed back at the operator. Burke was not authorized to procure a new safety guard and he was unable to repair the defective one. He orally notified the appropriate school authority, Mr. Estes, that the safety guard malfunctioned. No action was taken by the school authorities to repair or procure a new safety guard, nor did the school authorities act in any manner to prevent use of the saw without the safety guard by Burke or any of his students. The school rules prohibited use of the saw by seventh and eighth graders (Carey was in seventh grade at the time of the accident) and prior to the accident the school officials were unaware that seventh and eighth graders used the saw. Use of the saw without the safety guard in place was in contravention of the safety procedures recommended by the manufacturer. It was also a violation of the posted shop rules. The students received adequate safety and operating instructions from Burke.

At the time of the accident, Carey received permission from Burke to operate the saw. Both Carey and Burke were aware that the saw was to be operated without the safety guard in place. Indeed, the saw had never been operated with the safety guard during the entire time that Carey was enrolled in Burke's woodworking class.

At the time of the accident, Burke was positioned immediately in front of the saw facing Carey in order to supervise Carey's operation of the saw. Another student approached and tapped Burke on the shoulder. Burke turned his head. This movement distracted Carey, who instinctively looked up and while looking up cut his finger on the blade.

"A teacher has the duty to conduct his classes so as not to expose his students to an unreasonable risk of injury." The use of the saw by a twelve year old student without the safety guard in place is inherently dangerous and created an unreasonable risk of injury to the student. The type of injury which Carey suffered is within the scope of the risk which the duty is designed to prevent. Burke was aware of the potential dangers of using the saw without the guard and allowed Carey to use it anyway.

Accordingly, we conclude that the trial court correctly determined that Burke was negligent.

NEGLIGENCE OF CAREY

In the second assignment of error appellants allege as error the trial court's failure to find that Carey was negligent and that his negligence contributed to his injury. The actions of a twelve year old child "must be judged by his maturity and capacity to evaluate circumstances in each particular case, and he must exercise only the care expected of his age, intelligence, and experience."

It is uncontroverted that Carey is bright and a high achiever scholastically. However, Carey was twelve years old at the time of the accident. He was aware that the appropriate method to operate the saw was with the safety guard in place, but Burke was Carey's instructor. Carey was working on a class project. The saw was regularly used in the classroom without the safety guard with the permission of and under the supervision of Burke. A twelve year old, no matter how precocious, can hardly be expected to demand of his instructor that the saw be used only with the guard in place. Additionally, it is uncontested that Carey proceeded to use the saw in an appropriate manner. Carey's accident was caused by momentary inattention when he glanced up at his instructor after having observed with his peripheral vision a sudden movement of the instructor's head.

The trial court found that Carey was not negligent. After reviewing the record we conclude that it supports the trial court's determination.

FAULT OF THE STATE

In order to decrease percentage of fault on the part of Burke for purposes of contribution, Burke and Horace Mann argue fault on the part of the state independent of the negligence of Burke. The theory of independent fault is three fold: the state is strictly liable as the custodian of a defective thing; the state is independently at fault through negligence in knowingly allowing an unreasonably dangerous condition to exist, the protracted operation of the saw without a guard; the state is at fault through the doctrine of respondent superior for negligence of employees other than Burke.

Strict Liability—Custodian of a Defective Thing

. . . [F]or purposes of strict liability the owner or custodian of a thing (the state) is strictly liable if the plaintiff proves that under the circumstances the thing presented an unreasonable risk of injury which resulted in the damage. We find that to be the case here. The testimony is consistent that operation of this saw without the guard created an unreasonable risk of injury to the user. . . .

The remaining question is whether the state's fault based on strict liability is comparable to the fault of Burke based on negligence, and if so the percentages attributable to each. . . .

[W]e hold that the fault of a strictly liable defendant should be compared with the fault of a negligent defendant, regardless of the fault, if any, of plaintiff.

Fault should be apportioned according to the "nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed."

The state is strictly liable as the custodian of the saw which was stored and used in a classroom by students. Burke was aware of the dangerous propensity of the saw when used without the safety guard; that its operation was in violation of the safety rules promulgated for his department; and that the manufacturer warned against using the saw in this manner. Although the state had not fulfilled its duty to the students by repairing the safety guard or purchasing a new one, Burke knowingly authorized his students to use the saw in this dangerous manner.

After weighing the above factors we apportion 80% of the fault to Burke and 20% to the state. . . .

QUANTUM

In the fifth assignment of error appellants allege that the trial court abused its discretion in assessing damages.

Carey suffered a longitudinal cut from the fingertip into the proximal interphalangial joint (middle joint) of the right index finger. He was treated initially by Dr. Jack Loupe, orthopedist. He was next seen by Dr. Kenneth Cranor, orthopedist, for follow up care on May 4, 1981. At that time Carey had 15 to 45 degrees passive motion and 10 degrees active motion in the proximal interphalangial joint. Active motion is the motion caused by the tendons which go into the hand and passive motion is the ability to move the joint manually. Carey was required at that time to use a splint at night and exercise the finger during the day. On July 15, 1981, Carey underwent surgery for an attempted reconstruction of the joint in order to compensate for loss of bone. The surgery was accomplished by grafting bone taken from the iliac crest to the finger. A tendon graft was performed in April, 1982, in order to improve the active extension of the finger. At present Carey has a radial deviation of the affected joint at 12 degrees and a range of motion from the position of 10 degrees to the position of 30 degrees.

Dr. Cranor stated that the angular deviation may perhaps be improved or corrected by future surgery which would consist of the construction of an artificial joint. However, the long term prognosis for the artificial joint is a decrease in function in the joint. Without surgery, the angular deviation will more than likely increase. Carey's permanent impairment was assessed by Dr. Cranor at 58% of the finger and 15% of the hand. Dr. Cranor was unable to make a determination of disability in reference to Carey's communication skills. He stated that Carey is at an increased risk for further injury due to lack of motor control of the finger and its awkward position, therefore, Carey's participation in sports and daily physical activities should be limited. Additionally, the finger is now sensitive to the cold.

Carey's finger remains disfigured. In addition to normal uses of the finger, Carey must use his finger whenever he communicates with another person and it is always highly visible when he does so.

Carey's use of the finger is permanently impaired. Deaf persons communicate primarily by sign language, finger spelling or a combination of both. The finger impairment has not affected his signing skills. However, it has permanently affected his finger spelling skills. He is unable to form approximately twelve letters of the twenty-six letter alphabet. This impairment is comparable to a speech impediment. Various witnesses compared the impairment to a harelip or cleft palate, speaking with a lisp, or speaking with an almost unintelligible accent.

Finger spelling is the primary mode of communication for deaf persons in an academic environment. It is uncontested that Carey's scholastic aptitude test scores indicate that he almost certainly will be accepted into Gallaudet College (a college for the deaf) where he intends to major in computer science. Finger spelling is necessary to master the technical vocabulary used in that profession. Additionally, the finger impairment hampers the speed with which he can use the computer keyboard and a telephone device for the deaf (T.D.D.) both of which require typing skills.

Carey must continuously repeat himself when spelling with the right hand. He is able to spell with the left hand, however, he is not as adept with the left hand and becomes frustrated when he cannot spell as rapidly as he is accustomed to spelling.

Mrs. Virginia Boles, Carey's tenth grade teacher at the Louisiana School for the Deaf and accepted by the court as an expert interpreter, testified that in the classroom she was frequently unable to understand Carey and often requested that he repeat himself. She also observed Carey's distress and frustration with his communication problems. In her opinion, his communication impediment is considered a stigma to deaf persons.

Carey was awarded damages in the sum of $40,000 for pain and suffering; $60,000 for disfigurement; and $85,000 for emotional distress. The initial inquiry in a general damages award must always be directed at whether the trier court's award for the particular injuries and their effects upon this particular injured person is a clear abuse of the trier of fact's discretion. A resort to prior awards is inappropriate absent an abuse of the trier of fact's discretion.

After reviewing the record and in light of the above discussion of the nature of the injury and its unique effect on Carey, we are unable to determine that this trier of fact abused its discretion to this particular plaintiff. Accordingly, we will not disturb the award. . . .

BROWARD COUNTY SCHOOL BOARD v. RUIZ

District Court of Appeals of Florida, Fourth District, 1986

493 So. 2d 474

Anstead, Judge.

This is an appeal from a final judgment entered upon a jury verdict holding school officials liable for injuries inflicted upon appellee Jose Ruiz by fellow students. The case was tried in January, 1985 and the jury returned a verdict of $30,000.00 in favor of Ruiz. The trial court denied motions to set aside the verdict. We affirm the actions of the trial court.

Ruiz sued the School Board as a result of injuries he suffered in an assault at Hallandale High School on November 13, 1980. Ruiz, then a sophomore and a member of the school's junior varsity football team, had stayed briefly after school to have his picture taken with the rest of the team. The coach of the team had arranged for some of his players to practice with the varsity team that day, as the JV season had ended. However, Ruiz did not join this practice and instead, after the picture session, went to the cafeteria area to call his father for a ride home. Ruiz testified that his normal routine after practice had been to go to the cafeteria area to call his father and wait for a ride. The coach remained with the rest of the JV team at the varsity practice.

The cafeteria was located in the center of the main campus building. The precise location of the incident was across from the cafeteria door, in an area containing benches and pay phones. While waiting there for his father, Ruiz was attacked and beaten by three other students: Anthony Wilson, Jimmy Wright, and Ray Sands. According to Ruiz's testimony, he was sitting on a bench and looking at a book when he heard someone say "Hey." After that he lost consciousness and woke up in a hospital room. The only other witness to testify was a female student, Lateasea Fredericks. Fredericks and two other friends were in the area waiting for a bus. Fredericks knew the boys who beat Ruiz, but she had not seen Ruiz before. Fredericks stated that Wilson first said something to Ruiz, after which the two got into an "argument." Ruiz then turned around and started walking backwards away from Wilson in the direction of the office, when he was attacked from behind by Wright and severely beaten by all three students. Two custodians who had been in the cafeteria testified that they had been tricked into leaving the area by another group of students who told them that a custodian in another part of the building was in trouble. When they returned some thirty minutes later they found Ruiz on the floor. No direct connection was established between the two incidents.

School principal Linda Brown testified that responsibility to provide adequate supervision and security for students was delegated to teachers, administrators, and security personnel. However, these employees were not required to remain at the school for more than fifteen to twenty minutes after the last classes ended at 2:45 p.m. Significantly, no one was specifically instructed to watch the small group of students who regularly congregated in the cafeteria area after school to wait for the bus or for rides. Although one custodian testified that he sometimes took this responsibility upon himself, Brown stated that the custodians' responsibilities were limited to cleaning the building. In the case of after school extra-curricular activities, the coach or club sponsor would have supervisory responsibility. Coaches were instructed to remain on campus until the students had secured rides home. However, until practice was over, the coach's responsibility was over the students at the practice. The JV coach testified that it was not his duty to patrol the cafeteria or common areas after practice.

To prevail on a theory of negligent supervision by a teacher, a plaintiff must establish (1) the existence of a teacher-student relationship giving rise to a legal duty to supervise; (2) the negligent breach of that duty by the teacher; and (3) the proximate causation of the student's injury by the teacher's negligence. *Collins v. School Board of Broward County*, 471 So. 2d 560 (Fla. 4th DCA 1985). In *Collins*, this court found a duty of supervision to exist where a substitute teacher was conducting a shop class in which a student was sexually assaulted. One of the controlling factors identified in *Collins* was the fact that class was in session and the school had an absolute right to control the students' behavior at that time. In contrast is *Benton v. School Board of Broward County*, 386 So. 2d 831 (Fla. 4th DCA 1980), in which the court found no duty to exist where a kindergarten student left the class unaccompanied to go to the bathroom, and another student closed the bathroom door on her finger. The court in *Benton* viewed the imposition of a duty in that case to be "demonstrably unreasonable," for it would require the teacher to abandon her co-existing responsibility to the remainder of the class. With respect to the responsibility of the JV coach, we think *Benton* is more closely analogous to the present facts. If a kindergarten teacher is held not to have a duty to leave her class behind and accompany one student to the bathroom, then surely it cannot be said that a football coach has a duty to leave an ongoing practice to accompany a sixteen-year-old student to the telephone.

Although we agree with the School Board's contention that an inadequate case has been made as to any breach of supervision by the JV coach, we believe there was sufficient evidence for the jury to find a breach of the duty to provide adequate security to its students. While a school board is not an insurer against a student being injured, the school board is entrusted with the care of the students and has a legal duty to properly supervise student activity. The question is whether the absence of any supervisory personnel in the cafeteria area at the time of the beating constituted actionable negligence. In other words, did the school have a duty to provide some form of security in this area to prevent incidents from occurring? . . .

In both *Benton* and *Collins* we confirmed the existence of a duty to provide supervision and protection to minor students on the school premises. In our view, this duty includes responsibility for a centrally located part of the school building which students regularly occupy with the school's consent and knowledge during the hours immediately after the end of classes. The school's duty to provide supervision does not end when the bell rings. If anything, the time period immediately after the end of school presents the greatest danger of misconduct by students who have been restrained all day in a disciplined setting. In addition, while there was testimony that no one was specifically assigned to patrol the cafeteria area after school, the school itself recognized the need for supervision by adopting a comprehensive system of supervision and patrols designed to prevent students from being left alone on the campus either during the school day or during after-school activities. Accordingly, we conclude that there was evidence on the issue of duty to provide supervision at the time and place in question.

We also reject the contention advanced by the School Board "that under no circumstance it is [sic] foreseeable that fighting will occur when no more than a handful of students are in an area waiting to be picked up from school." The Florida Supreme Court's opinion in *Rupp* directly refutes this position:

> Whether a principal's or teacher's failure to supervise a student was the proximate cause of injuries suffered by a student is the issue most consistently litigated in negligent school supervision cases. The issue is usually complicated by the simultaneous tortious conduct of fellow students, so that the question becomes one of whether the fellow students' negligence was the intervening cause of the harm. Two distinct standards have developed. The first holds that a teacher's absence leading to an injury to one student by another can be the proximate cause of the injury only if the injury could not happen while the teacher was present. These cases generally find student misbehavior is the proximate and superceding [sic] cause of the harm. *See Ohman v. Board of Education*, 90 N.E.2d 474 (1949). The second, and more reasonably supported, holds that certain student misbehavior is itself foreseeable and therefore is not an intervening cause which will relieve principals or teachers from liability for failure to supervise:
>
> > "[W]e should not close our eyes to the fact that . . . boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years." Recognizing that a principal task of supervisors is to anticipate and curb rash student behavior, our courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence.
>
> *Dailey v. Los Angeles Unified School District*, 470 P.2d 360, 364 (1970). Courts following this standard find that a lack of deportment in unsupervised students is to be expected. Thus rough-housing or hazing at a high school club initiation is behavior which is not so extraordinary as to break the chain of causation between the school's failure to supervise and the injury to the student.

We perceive that the *Dailey* standard more nearly comports with Florida negligence law which recognizes that the intervening negligence of a third party does not relieve the original tortfeasor of his negligence if the intervening negligence is foreseeable. A standard which recognizes that certain student misconduct will foreseeably occur when students are left unsupervised fulfills the definition in *Gibson v. Avis Rent-a-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980) which finds an intervening cause foreseeable when " 'in the field of human experience' the same *type* of result may be expected again." A breach of the school's duty would be established by a failure to exercise reasonable care in discharging the duty of supervision. In this case the jury was entitled to find under the evidence presented that no supervision was provided at the time and place of the assault and that such supervision, if provided, would have prevented the assault from occurring. In summary, we find that the lower court did not err in refusing to set aside the jury's verdict, as there was sufficient evidence for the jury to find for Ruiz on his negligent supervision claim. While we are concerned that a public school should have to bear the cost of injuries intentionally inflicted by its students, we believe that the circumstances involved herein were such that a jury question was presented on the school's responsibilities to its students, and we have no authority to second-guess the jury's decision. . . .

Accordingly, the judgment based upon the jury verdict is affirmed.

* * *

HOYEM v. MANHATTAN BEACH CITY SCHOOL DISTRICT

Supreme Court of California, 1978
585 P.2d 851

Tobriner, Justice.

In this case we must determine whether, under California law, a school district may ever be held liable when, as a result of school authorities' negligent supervision of students on school premises, a pupil leaves the school grounds during school hours and is subsequently injured by a motorist. Although the trial court held that school district incurs no liability under such circumstances as a matter of law, we have concluded that the trial court was in error and that, if plaintiffs can prove that the pupil's injury was proximately caused by the school district's negligent supervision, the district may be held liable for the resultant damages.

In the summer of 1974 plaintiff Michael Hoyem, a 10-year-old boy, attended summer school at Foster A. Begg School in defendant school district. On July 16 Michael arrived at school to attend classes but before the end of scheduled classes he left the school premises. At a public intersection a motorcycle struck Michael and he was seriously injured. A few hours after the accident plaintiff Mary Ann Hoyem, Michael's mother, saw him in the hospital and suffered emotional and physical injuries.

Thereafter, Michael and his mother, alleging that the accident and resulting injuries were proximately caused by the school district's negligent supervision, instituted the present action against the school district. In the third amended complaint Michael sought recovery for the injuries he sustained in the accident, and his mother sought to recover (1) moneys she had expended for Michael's medical care, (2) damages to compensate her for the loss of Michael's "comfort and society," and (3) damages for the physical and emotional injuries she suffered on viewing Michael in his injured state at the hospital. The trial court sustained defendant's demurrer to all causes of action and dismissed the action; plaintiffs now appeal from the resulting judgment.

As we explain, the trial court erred in dismissing the causes of action seeking to recover damages for Michael's injuries and medical expenses allegedly caused by the school district's negligence. The causes of action based upon Mary Ann's loss of Michael's "comfort and society" and her own injuries allegedly incurred when viewing Michael in the hospital are, however, precluded by recent decisions of this court and were properly dismissed by the trial court.

I.

A school district bears a duty to supervise students while on the school premises during the school day and the district may be held liable for a student's injuries which are proximately caused by the district's failure to exercise reasonable care under the circumstances.

Although a school district is not an insurer of its pupils' safety, our cases have long established that a school district bears a legal duty to exercise reasonable care in supervising students in its charge and may be held liable for injuries proximately caused by the failure to exercise such care.

We recently reaffirmed this rule in *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 470 P.2d 360, 363, declaring that "California law has long imposed on school authorities a duty to 'supervise at all times the conduct of the children on school grounds and to enforce those rules and regulations necessary to their protection.' The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.'. . ."

The pleadings in the instant case are virtually identical to those which our court found sufficient to state a cause of action in *Dailey*. In both cases the complaint alleged that the school district failed to exercise ordinary care in supervising a student *while the student was on school premises*, and that such negligence proximately caused the student's resulting injury. Under well established principles, such general allegations of negligence, proximate causation and resulting injury and damages suffice to state a cause of action. Although defendant presents several arguments in an attempt to distinguish *Dailey* and related authorities, none of the proposed distinctions withstands analysis.

Defendant district first contends that the duty to supervise pupils applied in *Dailey* and earlier cases does not include any responsibility for assuring that pupils remain on the school premises during the school day. As the *Dailey* court pointed out, however, the duty to supervise includes the duty "to enforce those rules and regulations necessary [for pupils'] protection." Title 5, California Administrative Code, section 303 provides: "A pupil may not leave the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school." We have no doubt that this rule is at least in part for the pupils' protection, and that the school authorities therefore bore the duty to exercise ordinary care to enforce the rule.

Defendant argues, however, that no California case has as yet held a school district liable for an injury incurred off school premises. Viewing the situs of the injury as a limitation on the school district's duty to supervise, defendant contends that while a school district may be obligated to exercise reasonable care to prevent on-campus injuries, it bears no similar duty to supervise students so as to prevent off-campus accidents, unless the school has specifically undertaken to provide off-campus supervision.

In the first place, defendant's broad assertion that no California decision has held a school district liable for an off-school premises injury is simply inaccurate. In *Satariano v. Sleight*, 129 P.2d 35, a high school athletic field was located across a public street from the school gymnasium, and a 17-year-old student, hit by an automobile as he was crossing the street to get to the athletic field, suffered serious injury. The student brought suit against the school district, claiming that the school authorities' negligent supervision proximately caused his injuries. The evidence at trial indicated that although school authorities were aware that students regularly ran across the street outside of the crosswalk and when a teacher happened to be present the teacher would warn students to correct their behavior, the school had taken no general steps to prevent such dangerous conduct, such as stationing a teacher by the street during appropriate times.

The trial court in *Satariano* took the view that the school authorities' duty of supervision "ceased once the child was on a public street" and consequently absolved the school district of all liability for the student's injuries. On appeal, however, the Court of Appeal reversed, holding that in light of the school authorities' knowledge that many students regularly crossed the public street outside of a crosswalk, the jury should have been permitted to determine whether "ordinary care for [the students'] protection did not require of the school authorities something more than sporadic warnings to individuals and groups in those accidental instances when teachers happened to be present." Thus, *Satariano* refutes defendant's claim that the off-premises location of an injury is always sufficient, in itself, to insulate school officials from liability. . . .

In this context, defendant's emphasis on the *situs of the injury* is totally misplaced. Contrary to defendant's assertion, no California decision suggests that when a school district fails to properly supervise a student on school premises, the district can automatically escape liability simply because the student's ultimate injury occurs off school property. [Cf. *Calandri v. Ione Unified School Dist.* (1963) 33 Cal. Rptr. 333 (school district liable for injury student sustained *at home* as a result of dangerous instrument made in shop class).] Thus, in reversing the trial court decision in this case we neither impose a new duty on school districts nor in any way extend the well-established rule reiterated in *Dailey*; we merely reaffirm that school districts must exercise reasonable care in supervising their pupils while the pupils are on school premises. A district may be held liable if its breach of that duty proximately causes a student's injury.

The recent case of *Bryant v. United States* (10th Cir. 1977) 565 F.2d 650 confirms our conclusion that defendant's potential liability under the facts of this case flows directly from a school district's familiar duty to exercise ordinary care in supervising students on school premises. In *Bryant*, three young students at a New Mexico boarding school left the school premises without permission and were subsequently trapped in a snowstorm; as a result, the youngsters suffered extreme frostbite, necessitating the amputation of each student's legs. The students subsequently sued the federal authorities who ran the school, alleging that the injuries were proximately caused by the school's negligent supervision, and the jury returned a substantial verdict in favor of the students.

On appeal, the Tenth Circuit Court of Appeals affirmed the judgment. The court pointed out that under the governing New Mexico law, as in California, although "school authorities do not have responsibility for protective supervision at all places and under all circumstances", "*school authorities [do] have the duty to exercise ordinary care in protecting and supervising students while they are on school grounds*." Because the evidence in the case established that the school authorities had failed to provide adequate supervision while the students were playing outside of the school dormitories, permitting plaintiffs to run away from the school, the court concluded that the jury could properly conclude that the authorities had breached their duty to provide reasonable "on school ground" supervision and that the school's negligence in this regard was a proximate cause of the students' injuries. In light of the similarity between the applicable New Mexico and California law, the *Bryant* decision directly supports our conclusion that plaintiff's complaint states a cause of action against defendant district.

In support of its contention that the off-premises situs of plaintiff's injuries should absolve it of all responsibility, defendant relies on Education Code section 44808 which provides, in relevant part: "[N]o school district . . . shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district . . . has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. . . ." Although defendant contends that this statute cloaks the school with a blanket immunity for off-campus injuries unless the school undertakes to furnish off-campus supervision or sponsors an off-campus activity, neither the language nor the legislative history of the statute supports such an interpretation.

First, the language of the statute itself specifies that its limitation on liability does not apply to the allegations of the instant complaint. Although the initial portion of the statute provides that "no school district shall be responsible . . . for the conduct or safety of any pupil . . . at any time when such pupil is not on school property," the section goes on explicitly to withdraw this grant of immunity whenever the school district, inter alia, *"has failed to exercise reasonable care under the circumstances."** Plaintiffs' complaint alleges that the school district failed to exercise reasonable care. Assuming, as we must on appeal from a sustained demurrer, the truth of the allegations of the complaint section 44808, by its own terms, does not bar liability in the present case.

Second, the decisional history preceding the enactment of section 44808 indicates that the Legislature intended to limit a school district's liability under very different circumstances than those presented here. Two Court of Appeal cases, which preceded the enactment of the section and upon which defendant relies heavily, demonstrate that the Legislature was principally concerned with limiting a school district's liability for injuries to pupils either before or after school hours while children were either going to school or coming home after school. . . .

Defendant strenuously argues that overwhelming policy considerations militate against the imposition of liability on a district in a case, such as this in which the injured pupil left the school voluntarily, "playing hooky." Holding a school district liable for such an injury to a truant would lead, defendant urges, to "truant-proof" schools, where, to avoid liability, school personnel would be required virtually to chain students to their desks to keep them from leaving. Defendant and amicus school district spare no metaphor in portraying the fortress-like schools which would allegedly result from our holding that the instant plaintiffs have stated a cause of action against the instant defendant. The construction of these escape-proof schools would, it is stressed, be highly detrimental to education in this state.

The district's fears in this regard are, however, clearly unwarranted since, as already noted, the district is not liable for an injury sustained by a truant under all circumstances, but rather is legally responsible only for those injuries which proximately result from the district's failure to exercise "that degree of care 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.'" At trial, plaintiffs face the burden of showing that the district's supervisory procedures fell below that degree of care which reasonably prudent persons would exercise, and the jury may well absolve the district of liability in this regard. We require ordinary care, not fortresses; schools must be reasonably supervised, not truant-proof.

Finally, defendant argues that while a duty to supervise may arise during the school year, when attendance is compulsory, no such duty should be imposed during voluntary summer session. Defendant cites no authority for discarding the duty to supervise in summer session, and we find the proposed distinction artifical. Although a student may not be forced to enroll in summer school, once enrolled he must attend classes.

Additionally, the measure of the trust that parents place in the school to supervise their children is surely not diminished during summer. A large number of working parents enroll their children in summer school because they cannot afford alternative adult supervision. Surely these parents may legitimately expect adequate supervision. . . .

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*That the "reasonable care" exception in the statute is not accidental is clear from the legislative history. The original bill, passed by the Assembly, was identical to the current statute but did not include the final phrase about reasonable care. That phrase was added by Senate amendment and then approved unanimously by the Assembly. The intent of the Legislature is clear: when a school district fails to exercise reasonable care the immunity of this section evaporates.

II.

Whether or not defendant's negligence proximately caused plaintiff's injury is a question of fact for the jury.

Although defendant primarily argues that a school district bears no "duty" to prevent off-campus injuries, it also claims that as a matter of law negligent on-campus supervision *cannot* be the proximate cause of an off-campus injury. Proximate cause, however, is generally a question of fact for the jury, and, as we explain, on the basis of the allegations in the instant case the trial court could not properly hold as a matter of law that defendant's alleged negligent supervision on the campus did not proximately cause plaintiff's off-campus injury.

Defendant initially contends that it should not be expected to foresee that students will take advantage of a lapse in supervision to leave the school premises, and therefore that any off-campus injury is unforeseeable as a matter of law. Since at least the days of Huck Finn and Tom Sawyer, however, adults have been well aware that children are often tempted to wander off from school, and a jury might well conclude that defendants could have reasonably foreseen that this temptation might be especially strong during the summer session when a student's friends might not be in school. Indeed, the duty to supervise school children is imposed in large part in recognition of the fact that, without such supervision, students will not always conduct themselves in accordance with school rules or as safely as they ought to. Thus, we cannot say that Michael's departure from school was unforeseeable as a matter of law.

Defendant furthermore argues that the conduct of the motorcyclist who hit the plaintiff represents a "superseding cause" which cuts off any liability that the school district might bear for the accident. In *Dailey*, defendant school district pressed a similar argument, suggesting that the school's negligent supervision was not a proximate cause of the injury because a third party wrongfully hit the plaintiff. We rejected that argument, noting: "[t]he fact that another student's misconduct was the immediate precipitating cause of the injury does not compel a conclusion that negligent supervision was not the proximate cause of Michael's death. *Neither the mere involvement of a third party nor that party's wrongful conduct is sufficient in itself to absolve the defendants of liability, once a negligent failure to provide adequate supervision is shown.*

"[W]here [an] injury was brought about by a later cause of independent origin . . . [the question of proximate cause] revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved of liability towards the plaintiff; if, however, it is determined that the intervening cause was not foreseeable and that the results which it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries."

In the instant case, we certainly cannot say that the risk of a student's injury at the hands of a negligent motorist is, as a matter of law, not a foreseeable risk created by a school district's failure to exercise due care in supervising its pupils. Thus, the subsequent negligence of the motorist does not necessarily relieve the district of all liability for the injury. Of course, . . . the school district is entitled to join the motorcyclist as a cross-defendant in the action in order to pursue a claim for comparative indemnity; thus, if the jury determines that the motorcyclist is principally responsible for the injuries, he will be the party who will bear primary responsibility for the lion's share of the damages.

In sum, the trial court's decision sustaining defendant's demurrer cannot be justified on the ground that defendant's alleged negligence was not a proximate cause of plaintiff's injuries as a matter of law. The proximate cause issue should properly have been submitted to the jury.

Accordingly, the trial court erred in dismissing plaintiffs' action seeking recovery for Michael's injuries.

III.

Mary Ann's causes of action for loss of Michael's comfort and society and for her own injuries were properly dismissed.

Plaintiff May Ann Hoyem's cause of action for her expenditures on Michael's behalf was, like Michael's own cause of action, improperly dismissed. Her other causes of action, however, for loss of Michael's "comfort and society" and for her own injuries on viewing Michael in the hospital, are precluded by recent decisions of this court.

In *Baxter v. Superior Court* (1977) 563 P.2d 871, 872, this court declined "to enlarge the parent's cause of action to permit recovery for the loss of affection and society" when a child is injured. Mary Ann's cause of action on this score cannot stand.

Mary Ann also urges that this court extend the cause of action we recognized in *Dillon v. Legg* (1968) 441 P.2d 912, to include a plaintiff who suffers emotional and physical injury when seeing the primary victim of defendant's negligence hours after the accident. In *Dillon* this court set out the rule that "courts should allow recovery to a mother who suffers emotional trauma and physical injury *from witnessing* the infliction of death or injury to her child for which the tort-feasor is liable in negligence."

The Court of Appeals in *Deboe v. Horn* (1971) 94 Cal. Rptr. 77 declined to extend the *Dillon* rule to include a wife who suffered emotional and physical injury when seeing her husband in the hospital hours after he had been injured in an automobile accident due to defendant's negligence. Recently, in *Justus v. Atchison* (1977) 565 P.2d 122, we approved the *Deboe* opinion and denied recovery to an expectant father who was present in the delivery room when the fetus of his unborn child died, but who did not know of the death until later informed by doctors. We held in *Justus* that "*Dillon* requires more than mere physical presence: . . . the shock must also result from a 'direct emotional impact' on the plaintiff caused by 'sensory and contemporaneous observance of the accident.' " Mary Ann's *Dillon* cause of action, was therefore, properly dismissed.

IV.

Conclusion

As explained above, California school districts have long borne a legal duty to exercise reasonable care in supervising students on school premises during school hours. In the present case, plaintiffs' complaint alleges both that defendant breached this duty of care and that such negligence proximately caused Michael's injuries. These allegations are sufficient to state a cause of action against the school district.

Contrary to defendant's assertions, our holding in no way expands the supervisory obligations of school districts and does not place a new duty upon school authorities to control the conduct of students when they are off school premises. As we have explained, defendant's liability in this case is posited not on an alleged failure to supervise Michael when he was off the school premises, but rather on an alleged failure to exercise due care *in supervision on school premises*. Defendant will be held liable for Michael's injuries only if the jury concludes that defendant's on-site supervision was negligent and that such negligence was a proximate cause of those injuries.

The judgment is affirmed insofar as it dismisses Mary Ann Hoyem's causes of action for loss of Michael's society and comfort and for personal injuries sustained as a result of viewing Michael's injuries after the accident. In all other respects, the judgment is reversed. Plaintiffs shall recover their costs on appeal.

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12.5 NEGLIGENT HIRING AND VICARIOUS LIABILITY

When employees intentionally harm pupils or other employees, their employer may be held legally responsible under either or both of two separate and distinct legal theories, **negligent hiring** and **respondeat superior**. Under the doctrine of negligent hiring an employer is held responsible for having acted negligently in the hiring or retention of an employee who harms someone else. Under the doctrine of respondeat superior, an employer is held vicariously liable for wrongful acts committed by an employee within the scope of the employee's job.

NEGLIGENT HIRING

To establish that a school district should be held responsible for negligent hiring or negligent retention, an injured plaintiff must establish three points: that the person who caused the injury was unfit for hiring or retention or was only fit for the position if given more supervision than was actually provided, that the hiring or retention was the legal cause of the injury, and that the employer knew or should have known of the employee's lack of fitness. Because employers are often unaware of an employee's lack of fitness, liability typically turns on whether an employer should have become aware of an employee's unfitness through more careful investigation or closer supervision of the employee. For example, in a nonschool case, the employer of an apartment manager was held liable after the manager assaulted a female tenant. The assault was clearly outside the scope of the manager's employment, yet the employer was liable because the employer had made only a cursory investigation into the background of the manager, and a more thorough investigation would have uncovered the fact that the manager had been convicted of violent crimes. Legal cause was established because the employer's negligence was the only reason the manager was on the premises and had a passkey.[101]

On the other hand, an employer will not be held responsible if it cannot be established that the employer should have known about an employee's propensity for wrongdoing. In one case, a court ruled that a school district could not have known about a principal's history of sexual abuse when the principal had resigned from his previous position ostensibly for health reasons and none of the principal's references had mentioned his previous history. Telephone interviews with former employers did not reveal any history of allegations against the principal and letters of reference referred to him as "one of the most promising men in education" and lamented having "lost a very valuable educator."[102]

Some states have statutes dealing with inquiries about the arrests and convictions of prospective employees. California requires applicants for noncertified school employment to submit fingerprint cards prepared by a local law enforcement agency so the applicants may be screened.[103] California law also prohibits the hiring of people convicted of a violent or serious felony for positions requiring certification.[104] Some state laws prohibit employers from asking about arrests or detentions that do not result in convictions, whereas others specifically allow such inquires subject to certain restrictions regarding who in the company has access to the records.[105] Illinois exempts local governments and school districts from restrictions imposed on other employers and permits convictions to be used in evaluating employees.[106] New York permits an employer to deny employment based on criminal convictions only if the conviction is related to the job at issue.[107] Texas law requires school districts to "obtain criminal history record information." Federal regulations permit the use of arrest record information in hiring where it is related to the position and is relatively recent even if there is a disparate impact on a class protected under Title VII (see chap. 9).[108]

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[101] Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983); *see also*, DiCosala v. Key, 450 A.2d 508 (N.J. 1982); Garcia v. Duffy, 492 So. 2d 435 (Fla. Ct. App. 1986).

[102] Medlin v. Bass, 398 S.E.2d 460 (N.C. 1990).

[103] Cal. Educ. Code §§45125, 33129.

[104] Cal. Educ. Code §44830.1.

[105] *See, e.g.*, Conn. Gen. Stat. §31-511.

[106] Ill. Rev. Stat. Ann., ch. 68, §2-103.

VICARIOUS LIABILITY

Under the doctrine of respondeat superior school districts may be held vicariously liable for the negligent and, sometimes, the intentional wrongdoing of their employees and anyone else authorized to act on their behalf. Respondeat superior holds the ultimate employer, not the supervisor, liable for the tortious acts of its "servants," even if the employer was not at fault, provided the tortious act was committed within the scope of employment. Thus, teachers who negligently supervise the playground may expose not only themselves but also the school district to liability. Students and parental volunteers who negligently perform services for the school under the school's direction and control, even if they are not compensated, may also expose the district to vicarious liability.

Whether a district will be held liable under the doctrine of respondeat superior depends on a number of factors that vary somewhat from state to state. Often, the main issue is whether the employee's act was committed within the scope of employment. Whether an act was within the scope of employment is determined case by case, considering the time, place, and purpose of the act, its similarity to what was authorized or required of the employee, and a host of other factors. However, a school or other employer cannot avoid vicarious liability by forbidding in advance what was done or by ordering the employee to act carefully.

A California case required the court to decide whether a school should be held vicariously liable for a custodian sexually molesting an eleven-year-old student in the custodian's office after school. The court said that for the assault to be considered within the scope of the custodian's employment it was necessary that the act was required or "incident" to his duties or the misconduct was reasonably foreseeable. The court concluded that sexual molestation was "in no way related to mopping floors, cleaning rooms, or any of the other tasks that are required of a school custodian." The employee was motivated by his personal ends not the purposes of the job; the mere fact that he was on the job and used school facilities was not a basis for liability. It might have been different if the tortious act was done in connection with carrying out his assigned duties (e.g., a security officer who uses excessive force in controlling students). The court defined foreseeability to mean

> that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would be unfair to include the loss resulting from it

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[107] N.Y. Human Rights Law §296(15).

[108] *See*, Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).

> among other costs of the employer's business. . . . The test is not whether it is foreseeable that one or more employees might at some time act in such a way . . . but rather, whether the employee's act is foreseeable in light of the duties the employee is hired to perform.

The court had no difficulty in concluding that the sexual assault was nothing other than "highly unusual and very startling"; it was not the kind of conduct that was likely to occur in the conduct of the school district's business. Hence, the court concluded the district would not be held vicariously liable.[109]

Many courts will not hold a school district liable under respondeat superior for a teacher's sexual abuse of students if the school district was justifiably unaware of the abuse because sexual relations with students are completely outside the scope of teachers' job-related duties.[110] Recall, however, that a school district may be liable for sexual abuse under Title IX (see sec. 6.8), Title VII (see sec. 9.4) or other federal statutes (see sec. 12.9).

A school district may be held vicariously liable for acts outside the scope of a teacher's employment if the school district permits the teacher to act with apparent authority. Thus, in one case, a court held the school district liable when a girl was negligently injured during a "powder puff" football game held at halftime of the regular game, even though the game's sponsoring teacher had acted outside the scope of his employment. Because the powder puff team used the school's field and locker room, and the school helped publicize the game, the court reasoned that the school had a duty to ensure that the players were furnished with proper safety equipment.[111]

VICARIOUS LIABILITY OF PARENTS

If school districts can be held vicariously liable for the tortious acts of their employees, may parents be held vicariously liable for torts committed by their children? For the most part, they may not although most states have adopted statutes imposing a modest level of liability on parents for the willful and wanton torts of their child; however, these statutes limit the amount of liability to no more than several thousand dollars. Parents may also be held legally responsible for the torts of the child that the parent directed or encouraged, or if the parent entrusts the child with a dangerous instrument such as a gun, leaves a gun where it is accessible to a child, or fails to take a gun from a child. "More broadly, the parent who has notice of a child's dangerous tendency or proclivity must exercise reasonable care to control the child for the safety of others, and the parent who ignores the child's tendency to [for example] beat other children . . . may be held for his or her own negligence in failing to exercise control." Parents will not, however, be held responsible "for general incorrigibility, a bad education and upbringing, or the fact that the child turns out to have a nasty disposition." The parent may be under a duty to warn others of their child's disposition.[112]

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[109] Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287 (Ct. App. 1981).

[110] Godar v. Edwards, 588 N.W.2d 701 (Iowa 1999); John R. V. Oakland Unified Sch. Dist., 769 P.2d 948 (Cal. 1989).

[111] Lynch v. Board of Educ. of Collinsville Community, 412 N.E.2d 447 (Ill. 1980).

These general principles recently were applied by the Wisconsin Supreme Court in finding parents legally liable for the harm their son did to a teacher. The parents of Jason, who had attention deficit hyperactivity disorder, stopped providing him with his prescribed medication without informing themselves of the consequences of doing so by consulting with their physician and without informing school officials. Several months later, while a teacher was attempting to remove Jason from the classroom for misbehavior, Jason grabbed the teacher's hair with such force that she fell, herniating a disk in her neck; the teacher required an operation and the curtailment of almost all her activities outside of work. The court found the parents negligent, not for removing him from the medication, but for not taking reasonable steps to control their son—failing to inform themselves about the consequences of stopping the medication and about alternative forms of treatment, and failing to inform school officials that Jason's disruptive behavior might return. The court noted that if school officials had been notified, their approach to handling Jason would have been different, and the injury to the plaintiff might have been averted.[113]

12.6 LIABILITY FOR DANGEROUS BUILDINGS AND GROUNDS

Possessors of land and buildings, including school districts, owe duties to all who enter their property. Traditionally and in somewhat more than half the states today, the law divides those who enter property into three categories: trespassers, licensees, and invitees. The duty of owners to inspect, repair, and maintain their property and to warn entrants of possible hazards varies according to the category of entrant; the highest duty is owed to invitees and the lowest to trespassers. Premises liability cases in schools have involved many kinds of hazards: jagged edges on equipment, failing equipment, falling ceilings, slippery floors, pot holes on playgrounds, unsafe electrical equipment, icy sidewalks, badly illuminated passageways, defective playground and gym equipment, and attacks on visitors attending school events.

A **trespasser** is a person who enters the property of another without permission or privilege to do so. One also becomes a trespasser by leaving that part of a property to which one has been admitted and entering another part without permission. A person who breaks into a school at night to use the gym is a trespasser, but someone who uses an outdoor playing field on school grounds that is readily accessible and regularly used by the public for recreation is not. Trespassers must take care of themselves, even in encounters with inherently dangerous conditions such as an open pit with no railing or warning sign. Hence, the owner is not liable to the trespasser for failure to exercise reasonable care to make the property safe or to conduct business on the property in a way that would be safe for the trespasser. The owner, however, is not permitted intentionally to inflict injury on the trespasser, for example, by deliberately setting a trap. The owner must refrain from willful and wanton harmful conduct toward the trespasser. Although the law is interested in protecting property rights, it recognizes even a trespasser's interest in safety.

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[112] W. P. Keeton, ed., Prosser and Keeton on Torts §123 (5th ed. 1984); Restatement (Second) of Torts §316 (1977).

[113] Nieuwendorp v. American Family Ins. Co., 529 N.W.2d 594 (Wis. 1995).

A **licensee** is anyone who has a privilege—tacit or explicit consent—to enter on property. Licensees include social guests, salespeople calling at a private home, and people who have personal business dealings with employees of the owner or possessors of the land. Outside groups meeting at a school would generally fall into the category of licensees as would employee spouses entering the school for legitimate reasons. Most courts treat trespassers similarly to licensees if the trespasser's presence is known to the owner. The duty owed to licensees is to warn or otherwise protect them from unreasonable risks of which the owner is aware but the licensees are not. Licensees generally must assume the risks associated with hazards unknown to the owner.

An owner also has a duty to protect child trespassers and licensees from any **attractive nuisance** on the property. The attractive nuisance doctrine holds that an owner is liable for physical harm to trespassing children if the owner knew or should have known that children were likely to trespass on the place where the harm occurred, the owner knew or should have known that conditions on the property posed an unreasonable risk to children, the children because of their youth were not aware of the risk, the usefulness to the owner of maintaining the risk and the cost of eliminating it were slight as compared to the risk to children, and the owner failed to exercise reasonable care to eliminate the risk or protect the children.[114] Some states adhere to the additional requirement that the owner is only liable if the child was attracted on to the property by the same condition that injured the child.[115]

Schools are therefore responsible for taking reasonable steps to keep trespassing children away from potentially dangerous areas of the school and campus. However, some courts will not hold schools responsible for injuries to trespassing children caused by risks that children can understand and appreciate such as the risk of falling off a roof.[116] The classic attractive nuisance is an unguarded accessible swimming pool, but school grounds often contain other attractive nuisances like power tools, trampolines, lab equipment, and driver education cars.

An **invitee** may enter land as a business visitor or as a public invitee. Business visitors include customers and clients of businesses, drivers picking up and delivering goods, workers seeking employment, independent contractors and their employees doing work on the premises, and others invited to do work. People using public playgrounds or attending free public lectures and others on land by reason of a general invitation to the public are public invitees. Students, school employees, and, at times, even the public are invitees to schools.[117] Invitees have a legal expectation that the property will be made safe for them. Owners must protect them not only from hazards that the owner knew about, but also from hazards that the owner could have discovered by careful inspection of the property.

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[114] Restatement of Torts (Second) §339 (1965).

[115] Ambrose v. Buhl Joint Sch. Dist., 887 P.2d 1088 (Idaho App. 1994).

[116] Barnhizer v. Paradise Valley Unified Sch. Dist., 69, 599 P.2d 209 (Ariz. 1979) (en banc); *but see*, Stahl v. Cocalico Sch. Dist., 534 A.2d 1141 (Pa. Commw. Ct. 1987).

The duty owed the invitee is not that of an insurer of absolute safety. Nor is the possessor of land expected to discover all hazards instantly. What is required is reasonable prudence under the circumstances (e.g., taking steps to warn people away from floors made slippery by mopping).

Invitees and licensees are expected to take some care in protecting themselves from obvious hazards. The standard rule has been that the owner has no duty to protect the invitee against hazards that are known or obvious to entrants. However, many courts have in recent years found this rule unsatisfactory in cases where invitees are legitimately distracted and thus unable to protect themselves against known or obvious dangers. Thus, an increasing number of jurisdictions now embrace a different rule: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."[118] A hole in a school playground may be obvious, but the school district should anticipate that running students may not pay attention to the hole.

Regarding the child invitee, the duty of self-care will depend on the child's age, maturity, and experience. In some cases, school officials may invoke the defenses of contributory or comparative negligence or assumption of risk, but the child plaintiff may counter by claiming distraction, youthful lack of judgment and capacity, or inadequate warning of the hazard. In one case, a Missouri court ruled that a junior high school student injured in a long-jump competition had not assumed the risk of a dangerous condition created by the school district.[119] If players voluntarily continue to play even after becoming aware of dangerous conditions on a field, they may be found to have assumed the risk.[120]

Some states have adopted recreational use statutes that protect landowners from liability when the landowner invites members of the public to use the land for recreational purposes without charging a fee. The landowner will only be held liable for willful or wanton negligence. Even where such laws exist, they may or may not apply to schools.[121]

Slips and falls caused by accumulations of ice and snow on school property present an especially slippery issue. Courts in more than half the states, relying on either common law or statute, hold there is no duty to protect entrants against natural accumulations of snow and ice as long as the accumulation was not "artificial" (created by human activity), the hazard was not aggravated by the owner, and the owner did not voluntarily attempt to deal with the hazard but do so negligently. In states without this "natural accumulation" rule, snow and ice cases are treated like other premise liability cases. In deciding these cases, courts consider a number of factors including the fierceness of the storm, the length of the interval between the end of the storm and the accident, the obviousness of the hazard, whether the plaintiff could be expected to be carrying vision-obscuring objects, efforts undertaken to alleviate the hazard (e.g., spreading sand or salt), the adequacy of lighting, and whether a warning was provided.[122]

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[117] McIntosh v. Omaha Pub. Sch., 544 N.W.2d 502 (Neb. 1996).

[118] Ward v. K-Mart Corp., 554 N.E.2d 223 (Ill. 1990).

[119] Sheppard v. Midway R-1 Sch., 904 S.W.2d 257 (Mo. Ct. App. 1995).

[120] *Cf.*, Maddox v. City of New York, 487 N.E.2d 553 (N.Y. 1985).

[121] Rankey v. Arlington Bd. of Educ., 603 N.E.2d 1151 (Ohio Ct. App. 1992). *Contra*, McIntosh v. Omaha Pub. Sch., 544 N.W.2d 502 (Neb. 1996).

In the more than twenty states that have abolished the traditional categories of entrants on to property, premises liability cases are decided in a manner similar to other negligence cases (see sec. 12.4). Liability is determined based on the reasonableness of the owners' actions in light of the foreseeability of the injury. In making this determination the courts look at a variety of factors including the expected use of the premises; the reasonableness of the inspection, repair, and warning; and the burden on the owner to provide adequate protection. Schools in these states may face a heightened risk of premises liability especially with regard to entrants who traditionally would have been classified as licensees. For example, a student voluntarily using a school's athletic field for a summer workout would be considered a licensee in some states. The student would therefore be unable to collect damages for injuries sustained as a result of a hazardous condition at the field of which the school was unaware. However, in states that take the new approach, the student could collect damages if the school's inspection and maintenance of the field was not adequate given its likely use.

Finally, a brief note on federal legislation requiring public and private schools to inspect for and take appropriate steps to eliminate asbestos from their premises. Failure to comply with these requirements exposes the school district and school officials to monetary civil penalties. Individual school officials may be fined up to $25,000 per day for noncompliance with the law.[123]

12.7 EDUCATIONAL MALPRACTICE

Malpractice, whether in education, medicine, law, or another enterprise, is a specialized form of negligence arising out of a professional practice. The basic claim in a malpractice case is that a professional practitioner has caused harm by failing in the duty to competently provide services in accordance with the standards of the profession. Because malpractice is a category of negligence, all four elements of negligence must be proven. Thus, in medicine, the profession whose malpractice litigation has been the most widely publicized, successful suits do not arise simply out of undesirable results or even mistakes in medical treatment. A finding of medical malpractice requires proof that a doctor had a professional duty to treat a patient in a certain manner; that the doctor failed to live up to that duty, thus placing the patient at unreasonable risk of injury; and that the failure of performance was the legal cause of actual injury.

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[122] Gregory G. Sarno, Annotation, *Liability for Injuries in Connection With Ice or Snow on Nonresidential Premises*, 95 A.L.R.3d 1 (1979 & Supp.); Michael J. Polelle, *Is the Natural Accumulation Rule All Wet?* 26 Loyola U. Chi. L. Rev. 631, 647-648 (1995).

[123] Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C.A. § 2641 et seq.; 20 U.S.C.A. §§ 4014, 4021-22; 40 C.F.R. § 763; *see also*, Asbestos School Hazard Detection & Control Act of 1980, 20 U.S.C.A. § 3601 et seq.

In education two types of malpractice claims have been brought. The first type, brought by pupils who have failed to learn (usually to read), alleges a breach of duty in the provision of an instructional program. The argument is that from the student's failure to learn and from facts relating to the education given the student, a failure to teach properly can be inferred. Sometimes plaintiffs also make the related claim that the school was negligent in certifying learning that did not in fact take place—either by assigning passing grades or granting a diploma.[124] A second type of malpractice case alleges the provision of an inappropriate education or other harm as a result of failure to properly assess or classify.[125]

Courts have rejected educational malpractice claims in both categories on the grounds that educators have no statutory or common law duty to their students to perform up to a professional standard and that in any case considerations of public policy preclude recognition of educational malpractice as a cause of legal action. However, some instances of educational wrongdoing—for example, intentionally and maliciously furnishing false information to parents about a child's disability—may be actionable based on other legal theories.[126]

12.8 GOVERNMENT IMMUNITY AND STATUTES AFFECTING TORT SUITS

In the old common law, the doctrine of **sovereign immunity** protected state governments from tort suits. This decision by government to prohibit its laws and courts from being used against itself was descended from a principle of English law that, "The King can do no wrong." The doctrine of sovereign tort immunity has been extended from the state itself to its municipalities and school districts. As creatures of the state they are said to partake in the sovereignty of the state. This immunity of local government from suit is often called "governmental" or "municipal immunity."

Governmental immunity has never been a complete bar to all tort suits. One of the most common exceptions permits liability regarding activities deemed **proprietary**, done as an owner, as opposed to **governmental**. However, the criteria used for distinguishing between the proprietary and governmental activities of local government are not very precise, leading to many difficulties in classification. Some states consider all school district activities governmental, whereas others classify certain fee-charging activities, such as football games, as proprietary.

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[124] Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); Peter W. v. San Fransciso Unified Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976).

[125] Snow v. State, 475 N.E.2d 454 (N.Y. 1984); Doe v. Board of Educ. of Montgomery County, 453 A.2d 814 (Md. 1982); Hoffman v. Board of Educ. of N.Y., 400 N.E.2d 317 (N.Y. 1979); B.M. v. State, 649 P.2d 425 (Mont. 1982); Rick v. Kentucky Day, Inc., 793 S.W.2d 832 (Ky. App. 1990).

[126] Hunter v. Board of Educ. of Montgomery County, 425 A.2d 681 (Md. Ct. App. 1981), *aff'd in part and rev'd in part on other grounds*, 439 A.2d 582 (Md. Ct. App. 1982).

Another traditional common law distinction is between **discretionary** and **ministerial** acts. Discretionary acts involve planning, goal setting, evaluation, and the exercise of judgment; ministerial acts are performed in a prescribed manner not requiring judgment. In some jurisdictions, governments may be immune from liability for discretionary but not ministerial acts. For example, under these doctrines a school district could not be liable regarding the formulation of its snow removal policy but could be liable for the negligent execution of the policy.[127]

In any case, the doctrine of governmental immunity has undergone significant changes by reason of both legislative and judicial action. The often tortuous history and nature of these modifications vary from state to state. For example, in Michigan, governmental immunity was at first abolished by judicial action. Subsequently it was restored by statute, but the statute was held unconstitutional on procedural grounds. Finally, the statute was reenacted, with the newly enacted law abolishing immunity only regarding proprietary functions and the creation and operation of nuisances that result in injury to property or people. Immunity for governmental functions was retained.

Today, there is considerable variation in state law on the question of governmental immunity. In a few states, governmental immunity protects school districts from liability for the tort of negligent hiring or retention. Some states allow suits regarding nondiscretionary functions only. Others limit the dollar amounts that may be collected. Still others permit suits only for personal injury or death or only regarding dangerous conditions of property.[128] Illinois generally allows tort suits against teachers only for "willful and wanton" misconduct, but this rule is subject to exceptions that make schools vulnerable to certain other kinds of suits. Despite these variations, the trend is to limit governmental immunity, thus increasing the likelihood of school districts being held liable for tortious acts.[129]

GOVERNMENT OFFICER IMMUNITY

In addition to governmental immunity, a second type of immunity protects certain government officers from tort liability. Judges and legislators enjoy absolute immunity from tort suits regarding judicial or legislative acts even if performed in bad faith, with malice, or with corrupt motives. School board members as individuals traditionally enjoy absolute official immunity.[130]

Under traditional common law, school officials and employees may also enjoy qualified immunity for acts performed without bad faith or malice and only for discretionary not ministerial acts. This distinction has been difficult for the courts to apply with any consistency. A Georgia court ruled that the placing of a mat at the door of the school was discretionary.[131] A Minnesota court said that a guidance counselor was immunized against a suit brought by parents of a student who committed suicide; the court ruled that the decision whether or not to tell parents about the student's contemplation of suicide was a matter of professional discretion and thus was subject to immunity.[132] However, another Minnesota court decided that a principal's supervision of a gym teacher's gymnastics class was ministerial. The exercise of judgment, said the court, did not make it a discretionary act.[133] Concerning matters relating to the prevention of school violence, the trend in case law seems to be that school policies regarding the supervision of students, the hiring and assignment of security guards, and school safety generally are matters of discretion that enjoy immunity.[134] School officials may still be liable for the negligent execution of school safety policies.

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[127] Lostumbo v. Board of Educ. of Norwalk, 418 A.2d 949 (Conn. Super. Ct. 1980).

[128] *See*, Stahl v. Cocalico Sch. Dist., 534 A.2d 1141 (Pa. Commw. Ct. 1987).

[129] Ayala v. Philadelphia Bd. of Pub. Educ., 305 A.2d 877 (Pa. 1973).

[130] Holloway v. Dougherty County Sch. Sys., 277 S.E.2d 251 (Ga. Ct. App. 1981).

In recent years, many states have enacted statutes revising common law official immunity doctrines. These statutes may draw distinctions regarding the scope of immunity in terms of discretionary acts versus ministerial acts, acts within the scope versus outside the scope of employment, or curricular versus noncurricular functions, among others.[135]

A Connecticut statute provides that the qualified immunity doctrine will not protect an official in circumstances when it is apparent that a failure to act would be likely to subject an identifiable person to imminent harm. Based on that exception the Connecticut Supreme Court ruled that a superintendent did not enjoy immunity from a suit brought by a child who slipped and broke his elbow on a sheet of ice that had not been sanded or salted and with regard to which no warnings had been posted.[136]

STATUTES OF LIMITATION AND NOTICE OF CLAIM

The failure of the plaintiff to comply with a statute of limitations or a notice of claim statute can effectively bar a tort suit. Statutes of limitation establish deadlines for the initiation of suits usually from the date of discovery of injury. Notice of claim statutes require a plaintiff to give written notice to the defendant within a specified period of time, in some states as short as three months. The notice is intended to inform the defendant of the accident, and, thereby give the defendant an opportunity to investigate and prepare a defense, as well as to take steps to prevent repetition of the accident.[137]

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[131] Hennessy v. Webb, 264 S.E.2d 878 (Ga. 1980).

[132] Killen v. Independent Sch. Dist. No. 706, 547 N.W.2d 113 (Minn. App. 1996).

[133] Larson v. Independent Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1979).

[134] Mosley v. Portland Sch. Dist. No. IJ, 843 P.2d 415 (Or. 1992); Coyle v. Harper, 622 So. 2d 302 (Ala. 1993).

[135] *See, e.g.*, Kimpton School Dist. of New Lisbon, 405 N.W.2d 740 (Wis. Ct. App. 1987).

[136] Burns v. Board of Educ. of Stamford, 638 A.2d 1 (Conn. 1994).

[137] Plumeau v. Yamhill County Sch. Dist., 907 F. Supp. 1423 (D. Or. 1995).

INDEMNITY

Statutes in many states either authorize or mandate that local school districts indemnify their employees from personal monetary liability for torts committed in the scope of their employment. Educators may still be sued for tortious behavior, but the school is responsible for paying any damages. These laws usually indemnify both discretionary and ministerial acts but exclude malicious and unauthorized conduct.

12.9 SECTION 1983 AND TORTIOUS VIOLATIONS OF FEDERAL LAW

The other sections of this chapter concentrated on the application of state tort law to education. In this section we consider a federal law, known as Section 1983, that gives individuals a basis for seeking redress from schools and educators for violation of their federal constitutional and statutory rights. In some cases, Section 1983 may be used to supplement a tort claim, but in others, the federal statute may be the only legal basis for seeking monetary restitution for wrongdoing. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.[138]

Section 1983 does not itself create any substantive rights; it only authorizes suits for money damages for the violation of rights that other bodies of law establish. Many cases in which students or teachers allege violations of their constitutional rights (e.g., free speech, freedom from unreasonable searches, procedural due process, or equal protection) rely on Section 1983. For example, one teacher succeeded in collecting damages under Section 1983 from his superintendent and principal for the violation of his procedural due process and free speech rights. The administrators had concocted false negative evaluations regarding the plaintiff, delayed the hearing the plaintiff requested to rebut the charges, and dismissed him in part for defending another educator who had been fired.[139]

Section 1983 has also been used to seek monetary damages for violations of what courts refer to as "bodily integrity," a liberty interest protected by the Due Process Clause.[140] Most school bodily integrity cases concern sexual molestation[141] although excessive corporal punishment may also implicate this right.[142] Section 1983 also applies to violations of rights protected by federal antidiscrimination and other statutes.[143] However, some federal statutes include their own system of remedies that preclude use of Section 1983.[144]

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[138] 42 U.S.C. § 1983.

[139] Burnaman v. Bay City Indep. Sch. Dist., 445 F. Supp. 927 (S.D. Tex. 1978).

[140] Plumeau v. Yamhill County Sch. Dist., 907 F. Supp. 1423 (D. Or. 1995).

[141] Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994); Black v. Indiana Area Sch.

LIABILITY OF SCHOOL OFFICIALS

Section 1983 can only be used to bring suit against people acting under "color" of the state. This means that the statute cannot be employed against a private wrongdoer such as parents who abuse their children[145] or one student who racially harasses another. But what about a teacher or other school employee who violates the rights of a student or another employee? Is the wrongdoing employee to be viewed as a state actor subject to a Section 1983 lawsuit or as a private person? Asked in the language of the statute, under what circumstances are the actions of a school employee to be viewed as performed "under color" of the state?

The answers to these questions are not fully resolved. It is reasonably clear that school employees who act in furtherance of their job-related duties or the goals of the school are acting under color of the state. Thus, a principal who strip searches a class of students for drugs without a reasonable suspicion that a particular student has drugs (in furtherance of the goal of maintaining a safe school) is subject to a Section 1983 suit. But what about school employees who act for private purposes unrelated to school goals such as teachers who molest students (recall that some courts have said that respondeat superior does not apply to employee molestation of students because the act occurred outside of the scope of employment). The Fifth Circuit ruled that a custodian who raped a student was subject to a Section 1983 suit because the act occurred on school grounds when the custodian was "on the clock."[146] However, a successful Section 1983 suit against a school employee is less likely for acts committed away from school at a time when the employee is not being paid.

Even when school officials are acting under color of the state, they can only be held liable under Section 1983 for the deprivations of rights that they actually cause. Thus, the Second Circuit ruled that a principal could not be held liable under Section 1983 for a racially discriminatory dismissal of a teacher because the dismissal had been ordered by other school officials.[147]

Dist., 985 F.2d 707 (3d Cir. 1993); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989).

[142] Ingraham v. Wright, 430 U.S. 651 (1977).

[143] Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996); Williams v. School Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993).

[144] *See, e.g.*, W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995).

[145] DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989).

[146] Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395 (5th Cir. 1996). *Cf.*, Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402 (5th Cir. 1995). *But see*, Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395 (5th Cir. 1966) (Garza J., dissenting); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994) (Garwood J., dissenting).

[147] Taylor v. Brentwood Union Free Sch. Dist., 143 F.3d 679 (2d Cir. 1998).

Based on Supreme Court precedents, public officials, including school board members and school employees, have a qualified immunity from judgments under Section 1983.[148] The immunity applies as long as the official acted in good faith and did not violate a clearly established statutory or constitutional right that a reasonable person in that position would have known.[149] Obviously whether a particular point of law is sufficiently clear that a school official should have known of it will often be debatable. In one case, school officials conducted a search without individualized suspicion of all nineteen students in a class in order to look for a pair of stolen shoes. The district court concluded that the search was impermissible under the Fourth Amendment and that the plaintiff's constitutional rights were violated when he was suspended for refusing to consent to the search. However, the court noted that notwithstanding the *T.L.O.* case (see chap. 5), the legality of a search without individualized suspicion had not been specifically ruled upon by the Supreme Court or the Fourth Circuit in which the district court was located. Therefore, the court found that a reasonable school official would not have known that the search violated clearly established rights and therefore that the defendant principal was immune from monetary damages.[150] By contrast, the Eleventh Circuit held that reasonable school officials could not have believed that the Fourth Amendment would allow two eighth graders to be strip searched twice in an attempt to find some stolen money. The school officials were denied qualified immunity.[151] Any request for qualified immunity in Section 1983 lawsuits must be raised by the official claiming its protection,[152] and the official bears the ultimate burden of proving that the immunity applies.[153]

The following case applies Section 1983 doctrine to a case involving a teacher's treatment of a student. The opinion illustrates the importance of educators being knowledgeable about the rights of their students.

JEFFERSON v. YSLETA INDEPENDENT SCHOOL DISTRICT

United States Court of Appeals for the Fifth Circuit, 1987
817 F.2d 303

Politz, Circuit Judge:

In this 42 U.S.C. § 1983 case the district court denied defendants' motion to dismiss based on the plaintiffs' failure to state a claim upon which relief could be granted and the defendants' plea of qualified immunity. Because it poses solely a question of law, the ruling on qualified immunity is appealable. Finding that the pleadings allege conduct which "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known," we affirm.

CONTEXTUAL FACTS

The allegations of the complaint, which for purposes of a motion are assumed correct, present the following scenario. Jardine Jefferson, the eight-year-old daughter of complainants Dwight and Karen Jefferson, was a student at Glen Cove Elementary School, part of the Ysleta Independent School District, El Paso, Texas. Dr. Dick Gore was principal of the school and Cynthia Goodman was Jardine's second-grade teacher.

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[148] Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[149] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[150] DesRoches v. Caprio, 974 F. Supp. 542 (E.D. Va. 1997).

[151] Jenkins v. Talladega City Bd. of Educ., 95 F.3d 1036 (11th Cir. 1996).

[152] Gomez v. Toledo, 446 U.S. 635 (1980).

[153] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

On January 30 and 31, 1985, Ms. Goodman tied Jardine to a chair, using a jump rope and securing her by the waist and legs. During the first day Jardine was tied to the chair for the entire school day, except for the lunch hour. On the second day Jardine was tied to the chair for protracted periods. While tied, Jardine was denied access to the bathroom. This treatment, which no other student received, was not for punishment but was part of an instructional technique imposed by school policy. The pleadings allege that as a consequence of this exercise Jardine suffered humiliation and mental anguish, and was impaired in her ability to study productively.

In addition to several state law causes of action, the complainants invoked 42 U.S.C. § 1983, alleging that Gore, Goodman, and the school district violated the rights secured to Jardine by the Fourth, Fifth, Eighth, and Fourteenth Amendments. The defendants moved to dismiss claiming that the allegations did not state a cause upon which relief could be granted. This part of the motion was denied and is not subject to an interlocutory appeal. In addition, defendants claimed qualified immunity. . . .

ANALYSIS

The defense of qualified immunity protects a public official from liability in the performance of his duties unless he violates a clearly established statutory or constitutional right of another known to or knowable by a reasonable person. The principal and teacher defendants are thus immune from civil liability to Jardine unless their alleged conduct, tying Jardine to her chair in the classroom for nearly two days, violated one or more of Jardine's constitutional or statutory rights of which they reasonably should have been aware. In making this inquiry at this early stage of the proceeding, we focus "not on the defendant's actions but on the right allegedly violated."

The facts alleged, if proven, would implicate Jardine's Fifth and Fourteenth Amendment rights to substantive due process, specifically her right to be free from bodily restraint. We have stated that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." The same applies to state-occasioned restraints which are not justified by the victim's conduct or other extenuating circumstances.

In determining what a reasonable teacher should know in this instance, it is not necessary to point to a precedent which is factually on all-fours with the case at bar. It suffices that the teacher be aware of general, well-developed legal principles.

We are persuaded that in January 1985, a competent teacher knew or should have known that to tie a second-grade student to a chair for an entire school day and for a substantial portion of a second day, as an educational exercise, with no suggested justification, such as punishment or discipline, was constitutionally impermissible. A young student who is not being properly punished or disciplined has a constitutional right not to be lashed to a chair through the school day and denied, among other things, the basic liberty of access to the bathroom when needed.

Defendants seek the protection of the ruling in *Ingraham v. Wright*, 430 U.S. 651 (1977), which held that students do not have an Eighth Amendment right to be free from corporal punishment. Defendants misperceive both the pleadings and the law. The petition asserts that Jardine was not being punished, but was the subject of an instructional technique. As such, the holding of *Ingraham v. Wright* and its progeny are inapposite. Further, even if this were punishment, it would not necessarily be protected conduct, for as we noted in *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243, 1246 (5th Cir. 1984), "[c]orporal punishment is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."

At this stage of the proceedings defendants are not entitled to a dismissal as a matter of law based on their claim of qualified immunity. In so holding, we express no opinion on the ultimate resolution of this matter after the facts are fully developed. That decision will first lie with the district court to whom it is entrusted.

The judgment of the district court rejecting the claim of qualified immunity is affirmed.

* * *

In addition to Section 1983, another federal statute, Section 1985, can be used to sue school officials for conspiracy to deprive others of their rights to equal protection of the laws.[154] This happened to a group of school officials who worked together to prevent parents from pursuing a suit for the sexual molestation of their daughter by lying to the parents, misinforming them that bringing charges would expose them to a suit for defamation, and telling them that pursuing the case could cause problems for their other child.[155] Under yet another federal statute, Section 1986, school officials who have the power to prevent a conspiracy prohibited under Section 1985 may be held liable for damages if they deliberately or negligently fail to prevent the conspiracy.[156]

LIABILITY OF SUPERVISORS

In the case presented previously, Jardine Jefferson sued not only the teacher who mistreated her but also the school principal and the school district itself. Under what circumstances may plaintiffs in a Section 1983 lawsuit prevail against the supervisor or employer of the person who violated their constitutional rights?

The Supreme Court has said that supervisors can be held accountable under Section 1983 but not simply for being the supervisor of a wrongdoer. Rather, it is necessary that the supervisors themselves also committed a wrong that in some way aided, encouraged, or permitted the violation of a right.[157] When the necessary conditions are met, supervisors may be held liable either for inadequate supervision or for the inadequate training of subordinates.[158]

The lower courts, however, are divided regarding the standard for determining whether a supervisor may be held responsible under Section 1983. A number of circuits require a showing of "deliberate indifference" by the supervisor to the wrongdoing although the meaning of this standard varies somewhat from circuit to circuit.[159] By contrast, the First Circuit says that supervisory liability requires a finding of "supervisory encouragement, condonation or acquiescence" or "gross negligence."[160] The Second Circuit uses a gross negligence standard.[161] No matter how the standard is phrased, the chances of a supervisor being found liable increase with: evidence of prior similar incidents and that the supervisor was aware of the prior incidents, the recency of prior incidents and the shortness of the time period over which they were spread, the inadequacy of the supervisor's response to the prior similar incidents, the inadequacy of the response to the incident that is the subject of the litigation, efforts to cover up or suppress complaints, and the strength of the proof that the supervisor's inadequate response is causally linked with the plaintiff's injury.[162]

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[154] 42 U.S.C. §1985(3).

[155] Larson v. Miller, 55 F.3d 1343 (8th Cir. 1995).

[156] 42 U.S.C. §1986.

[157] Monell v. Department of Social Serv., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1975).

[158] Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995), *aff'd*, 122 F.3d 1207 (9th Cir. 1997).

[159] Larson v. Miller, 55 F.3d 1343 (8th Cir. 1995); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994); Gates v. Unified Sch. Dist. No. 449, 996 F.2d 1035 (10th Cir. 1993); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989).

[160] Hegarty v. Somerset County, 53 F.3d 1367 (1st Cir. 1995).

[161] Black v. Coughlin, 76 F.3d 72 (2d Cir. 1996).

LIABILITY OF SCHOOL DISTRICTS

In *Monell v. Department of Social Services of New York*[163] and *Owen v. Independence*,[164] the Supreme Court held that Section 1983 could be used to bring suit against local governmental bodies like school districts and that government immunity cannot bar these suits. However, the *Monell* Court held that a local government unit cannot be held liable solely because it employs a wrongdoer. The doctrine of respondeat superior does not operate under Section 1983. Thus, unless an employee's wrongdoing meets one of the conditions listed later, the school district will not be liable. Nor as a general proposition will government agencies be held responsible for a failure to take affirmative steps to protect individuals from wrongdoing by other private individuals; in instances where students violate the rights of other students, the school district again will not be liable unless the case meets one of the conditions listed next.

A school district may be held liable under Section 1983 for wrongs committed under its supervision or auspices if any of the following conditions are met:

1. Either (a) the wrong doing was undertaken pursuant to a custom or formal policy of the district, (b) the individual who committed the wrongful act was an official with final policy making authority, or (c) an official with final authority ratified a subordinate's wrongful act.[165] The idea here is that if any of these circumstances is proven, the wrong-doing can fairly be said to have been caused by the district's policy. The failure to have a formal policy for dealing with sexual harassment might expose a district to Section 1983 liability because the lack of a formal policy indicates a custom of tolerating sexual harassment.[166] (Recall that under Title IX districts are expected to have a policy for dealing with sexual harassment.) In one case, a principal and an assistant principal over a period of four years discouraged students from pressing charges of sexual assault by their teachers, expressed doubt regarding the validity of reported incidents, took no steps to confront the teachers, and kept only secret notes of the accusations rather than placing anything in the teachers' file. The Third Circuit ruled

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[162] Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. Ill. L. Rev. 147 (1997).

[163] 436 U.S. 658 (1978).

[164] 445 U.S. 622 (1980).

[165] Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992). *See also*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. Cincinnati, 475 U.S. 469 (1986).

[166] Doe v. Estes, 926 F. Supp. 979 (D. Nev. 1996).

that evidence such as this could be sufficient for a jury to conclude that the principal and assistant principal had established a custom or policy of reckless indifference to sexual abuse by teachers and that this climate was a cause of the sexual assault on the plaintiff by her teacher.[167] The principal and assistant principal exposed not only themselves personally but also the school district to liability under Section 1983.

2. A school official with authority to take corrective action had actual notice of wrongdoing actionable under Section 1983 and was deliberately indifferent. This is the standard recently developed by the Supreme Court to decide whether school districts are liable in Title IX cases,[168] and it can be applied in Section 1983 cases as well. Inadequate hiring policies[169] or the inadequate training of employees may be viewed as forms of indifference.[170] Inadequate training combined with deliberately indifferent supervision is a potent formula for district liability. A school district was found liable for a strip search of students because a previously widely publicized strip search of students had not resulted either in a policy against such searches or training of school employees.[171]

3. Affirmative acts of the school district expose plaintiffs to dangers to which they would not otherwise have been exposed or increase the risk of preexisting dangers.[172] The mere fact that students' rights have been violated at school or that the violator is a teacher does not mean that this "state created danger" condition has been met.[173] Rather, the plaintiff must show that the school district exposed the plaintiff to people with a known propensity to harm the plaintiff or provided such people with the means or increased opportunity to injure the plaintiff.[174] Assigning a student of known violent propensities to the class of an inadequately trained teacher is the kind of affirmative step that could lead to liability.[175]

4. A school that is part of a state-run correctional facility or other involuntary custodial arrangement fails to protect a student against injury by another student or other third party.[176] Several federal courts have said that this "special relationship" condition does not apply in ordinary public schools.[177]

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[167] Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989).

[168] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

[169] Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395 (5th Cir. 1996); Benavides v. County of Wilson, 955 F.2d 968 (5th Cir. 1992).

[170] City of Canton v. Harris, 489 U.S. 378 (1989); Doe v. Estes, 926 F. Supp. 979 (D. Nev. 1996).

[171] Kennedy v. Dexter Consol. Sch., 955 P.2d 693 (N.M. App. 1998).

[172] Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198 (5th Cir. 1994); Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521 (5th Cir. 1994).

[173] D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc).

[174] Plumeau v. Yamhill County Sch. Dist., 907 F. Supp. 1423 (D. Or. 1995).

[175] *Cf.*, Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989).

[176] DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989); Griffith v. Johnson, 899 F. 2d 1427 (5th Cir. 1990). *Cf.*, Walton v. Alexander, 44 F.3d 1297 (5th Cir. 1995).

[177] Sargi v. Kent City Bd. of Educ., 70 F.3d 907 (6th Cir. 1995) (citing supporting cases from the 3d, 7th, and 10th Circuits).

DAMAGES

Plaintiffs suing under Section 1983 are entitled to recover only nominal damages unless they can show actual loss. The damage award is not based on the value or importance of the violated right, but only on the actual injuries suffered. Plaintiffs may also be able to obtain punitive damages against individual defendants who act with malice.[178] Punitive damages against a school district itself are not permitted because the Supreme Court reasoned that punitive damages against a government entity would only punish the taxpayers and that only individuals, not government entities, can act with malice.[179] Even with these limitations, individuals who win Section 1983 lawsuits can sometimes receive large awards.

12.10 SUMMARY

Tort law allows individuals to sue for compensation for injuries caused by the wrongful acts or carelessness of others. The injury can be to the individual's body, property, reputation, or emotional well-being. Depending on the circumstances, school districts, individual school board members, administrators, and teachers may all be held liable for the commission of torts; however, a variety of common law and statutory immunities and other limitations on tort suits against governmental bodies and their employees may apply. Like many aspects of tort law, these immunities and limitations vary considerably from state to state.

Intentional torts are either acts designed to produce harm or acts that the actor realizes were likely to cause harm to another. In education, they are: battery, assault, false imprisonment, and intentional infliction of mental distress. Educators may use reasonable force in self-defense or to enforce legitimate orders or school rules. Also, except where prohibited by statute, educators have a common law privilege to administer corporal punishment to students, but students may still sue for assault and battery if the corporal punishment is excessive or otherwise unreasonable.

Defamation refers to false communications that harm an individual's reputation and good name. Libel is written defamation, and slander is oral defamation. The law of defamation varies depending on whether the communication deals with a matter of public concern and whether the person defamed was a public official, public figure, or private individual. School officials and school boards may be held liable for defamatory statements in the school newspaper. Educators may also be liable if they knowingly write false and damaging letters of recommendation.

Invasion of privacy protects individuals including students and teachers from the unreasonable publication of private facts. The privacy of student records is further protected by a federal law, the Family Educational Rights and Privacy Act, also known as the Buckley amendment. The act requires that parents have access to their children's educational records, that specified procedures be followed if parents request modification of their child's records, and that, with certain specified exceptions, access to a child's records be granted to individuals outside the school only with parental consent.

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[178] Carey v. Piphus, 435 U.S. 247 (1978); Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986).

[179] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

Negligence is careless or reckless behavior that causes injury to another person. It is by far the most common tort in education. School districts and individual educators can be found negligent for injuries to students, employees, or visitors to the school if they had a duty to live up to a standard of care recognized in law, they failed to live up to the duty, another person was injured as a result of their failure, and the extent and value of the injury can be measured. Teachers have a general duty to behave in all situations as would a reasonable and prudent teacher with similar training and physical capacity. The exact level of supervision and care that is required in any particular situation depends on the circumstances, but the school is not expected to guarantee that accidents will never occur.

School districts may also be held liable for injuries caused by hazards on their property. These cases generally turn on the adequacy of the design of buildings and equipment, maintenance, and whether conditions adhere to local building codes. In most states, liability is greater with regard to invitees to the school as opposed to trespassers; however, the school is still likely to be held liable if a child trespasser is injured by an encounter with an attractive nuisance like an unattended accessible swimming pool.

Malpractice is professional negligence. Two types of educational malpractice claims have been brought: the failure to learn caused by improper instruction and harm caused by misclassification. Virtually no cases have been won by plaintiffs. Courts have rejected claims of educational malpractice for failing to prove the elements of negligence and for reasons of public policy.

Under a federal law known as Section 1983, individuals may bring suit against government agencies and their officers and employees for violations of federal constitutional or statutory rights. School districts with policies that violate the constitutional or federal statutory rights of students, parents, or employees are vulnerable to these suits. Individual educators may also be sued and required to pay monetary damages if they personally violate the civil rights of others or, under certain circumstances, if they permit their subordinates to do so.

THE CONSTITUTION
OF THE UNITED STATES OF AMERICA

[Parts of the Constitution pertinent to education law.].

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 10. No State shall pass any . . . Law impairing the Obligation of Contracts . . .

ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

ARTICLE VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV [1791].

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791].

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VII [1791].

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

AMENDMENT VIII [1791].

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX [1791].

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791].

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI [1798].

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV [1868].

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XV [1870].

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIX [1920].

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVI [1971].

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

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